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**THE
INDIAN SALE OF GOODS
AND THE
INDIAN PARTNERSHIP ACTS**

WITH A COMMENTARY, CRITICAL AND EXPLANATORY,

BY

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SECOND EDITION

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CATE-GENERAL OF INDIA.

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PREFACE TO SECOND EDITION.

Since the last edition of these works there have been numerous decisions which have been incorporated in the texts in their appropriate places, without disturbing the general structure of that edition. The texts of the Acts, as amended, have been brought up-to-date. It is not possible to refer to all the important decisions here but a few of them may be noticed. A series of English decisions have elucidated the provisions of section 30 of the Indian Sale of Goods Act, which were in doubt. It is now decided that this section does not apply to cases where the sale having been completed the goods are bailed or leased back to the seller, but that it is confined to cases where the contract of sale has not been completed by delivery. It has also been decided that the word "possession" includes possession by another person on behalf of the person whose possession is material. A decision of interest to the commercial community is *Amrtilal v. Bhagwandas* (1939) Bom. 454 where the term "jangad" was construed not to mean "sale or return." The case of *Comptoir D'Achat Et De Vente Du Boerenbond Belge S.A. v. Luis De Ridder, Limitada* (1949) 1 All. E.R. 269 is an illustration of the proposition that a contract may not be, on its true construction, a c.i.f. contract although so described. It has now been decided by the Privy Council in *Sivayya v. Rangana-yakulu* (1935) 62 I.A. 89 that a defendant is entitled to justify his repudiation on any ground which existed at the time of repudiation. This decision has set at rest a conflict of decisions in India. Another important decision is that of *Muralidhar Chatterjee v. International Film Co., Ltd.* (1943) 70 I.A. 35 and this has been dealt with in its appropriate place. It is interesting to note that there has been only one English decision on the law of partnership since the last edition of this work although there have been numerous decisions in India, some of them of great importance.

Since the last edition of these works the legal profession has sustained a great loss in the death of both Sir Frederick Pollock and Sir D. F. Mulla. The Editor hopes that this new edition of established text-books will be considered as useful as its predecessors. It has given particular pleasure to the Editor to undertake this work as he was associated with Sir Dinshah Mulla in the framing of the Sale of Goods Act and the Partnership Act.

The Editor wishes to record his thanks to Mr. K. S. Shavaksha, Barrister-at-Law, for his assistance in the preparation of this edition.

January, 1950.

B. L. M.

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THE INDIAN SALE OF GOODS ACT 1930

(ACT III OF 1930).

RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 15TH
MARCH, 1930.

**An Act to define and amend the law relating
to the sale of goods.**

WHEREAS it is expedient to define and amend the law relating to the
sale of goods ; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title, extent
and commencement.

1. (1) This Act may be called The **S.**
Indian Sale of Goods Act, 1930.

(2) It extends to all the provinces of India including
the Sonthal Parganas.

(3) It shall come into force on the first day of July,
1930.

History of the Act.—The history of the previous law and circumstances leading up to the passing of the Act, its scheme and special features are fully dealt with in the reports of the Special Committee and the Select Committee set out in appendices I and II respectively of the first edition of this work. It is, therefore, sufficient to state here that it repeals and replaces sections 76 to 123 of the Indian Contract Act, 1872, which previously had been the code dealing with the sale of goods in India, and is based upon, and substantially reproduces the English Sale of Goods Act, 1893, subject to certain alterations and modifications which further experience has suggested as desirable, or are required by the particular needs of India. In substance, however, the law in the two countries is now the same and English authorities on the interpretation of the different sections, although not technically binding in India, may properly be referred to.

The Act contains no illustrations.—The Legislature has abandoned the method, which was adopted when the Indian Contract Act was framed, of attempting to guide the Courts in interpreting a section by giving illustrations of it, and has left it to the Courts to construe each section as it stands. The Act, therefore, contains no illustrations ; and whenever

S. 1 examples are given in the following pages by way of illustrating or explaining the provisions of any section, those examples, which in the great majority of cases are actual decisions of the English or Indian Courts, are part of the commentary on the section only, and are not part of the section (a).

Old English forms of action.—The English Act is a codification, and, admittedly, a very successful codification of the English common law. Many of the English decisions which have settled the law of the sale of goods were in actions under the old system of pleading, founded either on the disturbance of legal possession (*trespass*) or on acts of dominion violating the plaintiff's right of property (*trover*) or on acts by which the plaintiff was prevented from resuming possession (*detinue*). It may be useful to mention very shortly a few of the leading distinctions. They still exist, with more or less modification in several American jurisdictions, though in England the plaintiff need only allege sufficient facts to bring his case within one or more of the old forms of action, without stating that he relies on any one of them.

The right to sue in trespass depends on possession existing, the right to sue in trover or detinue on an immediate right to possession, at the time of the cause of action. These rights may exist at the same time and may be in different persons.

Generally an owner out of possession cannot sue in trespass, but one who is entitled to resume possession at will, such as a bailor at will, or on a condition determinable at his will, can do so.

A bailee of goods from the owner can have, if the facts are sufficient to support it, any of the above forms of action against a wrongdoer, since he has the legal possession, and is entitled to possess the goods against everyone except the bailor, and against him also in many cases.

An owner who is out of possession and not entitled to the immediate possession can have only a special action on the case.

Extent of Act.—This Act extends to all the provinces of India including the Sonthal Parganas. The expression "all the Provinces of India" has been substituted for the expression "the whole of British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. The term 'Provinces' has been defined (b) as follows:—

"and 'the Provinces' shall mean, as respects any period before the establishment of the Dominion of India all territories for the time being comprised within British India and as respects any period thereafter, all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces."

(a) Nevertheless, so erroneously considered in *Girdhari Lal v. Schales &* | *Adams Ltd.* (37) A.L. 566 at p. 567.

(b) General Clauses Act (1897), s. 3 (43).

Act not retrospective.—By section 66 (1) it is expressly enacted that the Act is not retrospective. Its provisions, therefore, do not apply to contracts of sale of goods made before the Act came into force.

Sec.
1, 2

Conflict of laws.—Generally speaking, the law regulating the disposition of personal property is, in accordance with the rule *locus regit actum*, the law of the country in which the property is situate, and, consequently, a transfer of personal property valid according to that law is binding everywhere, whether the transfer be by way of sale (c), gift (d) or pledge (e). Matters relating to the validity or interpretation of the contract are usually governed by the law of the country where it is made, but when the contract is made in one country, but is to be performed in another, it may be presumed that the law of the place in which it is to be performed is the law which is to be applied (f). These rules, however, are only based upon the presumed intention of the parties and may be rebutted by the facts of any particular case in which a different intention is either expressed or may be inferred (g). The mere fact, however, that goods sold f.o.b. at an Indian port under an Indian contract are destined to a foreign country will not rebut the presumption, and the contract will be governed by Indian law (h). Questions of evidence, however, are governed by the *lex fori* (i). An Indian merchant, therefore, if he is compelled to sue in the English courts on a contract made in India, may find himself without a remedy on the ground that the requirements of the English Statute of Frauds have not been complied with (j).

In the absence of evidence to the contrary, foreign law is presumed to be the same as the municipal law. If the foreign law is different and the difference is relied on, the person setting up the foreign law must prove it as a matter of fact (k). In England it is for the judge and not for the jury to decide what the foreign law is (l).

2. In this Act, unless there is anything repugnant
Definitions. in the subject or context,—

(1) “buyer” means a person who buys or agrees to buy goods;

(c) *Cammell v. Sewell* (1860) 5 H. & N. 728, 120 R. R. 799; *Embiricos v. Anglo-Austrian Bank* (1905) 1 K.B. 677, 483, C.A.

(d) *Re Korvine's Trust* (1921) 1 Ch. 343, 348.

(e) *City Bank v. Barrow* (1880) 5 App. Cas. 664, 677.

(f) *Dacey*, Conflict of Laws, 5th ed., Rule 155.

(g) See *Pollock & Mulla*, pp. 10-11 and authorities there cited.

(h) *Sumner Permain & Co. v. Webb & Co.* (1922) 1 K.B. 55, C.A.; *Benaim & Co. v. Debono* (1924) A. C. 514, P.C.

(i) *Dacey*, Conflict of Laws, 5th ed., p. 849 *et seq.*

(j) *Leroux v. Brown* (1852) 12 C. B. 801, 92 R. R. 889.

(k) *The Parchim* (1918) A. C. 157, 160-161, Lord Parker.

(l) Supreme Court of Judicature (Consolidation) Act, 1925, s. 102.

S. 2

- (2) "delivery" means voluntary transfer of possession from one person to another ;
- (3) goods are said to be in a "deliverable state" when they are in such state that the buyer would under the contract be bound to take delivery of them ;
- (4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfingers' certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented ;
- (5) "fault" means wrongful act or default ;
- (6) "future goods" means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale ;
- (7) "goods" means every kind of moveable property other than actionable claims and money ; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale ;
- (8) a person is said to be "insolvent" who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not ;
- (9) "mercantile agent" means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods ;
- (10) "price" means the money consideration for a sale of goods ;

- (11) "property" means the general property in goods, and not merely a special property; S. 2
- (12) "quality of goods" includes their state or condition;
- (13) "seller" means a person who sells or agrees to sell goods;
- (14) "specific goods" means goods identified and agreed upon at the time a contract of sale is made; and
- (15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, have the meanings assigned to them in that Act.

Definitions.—These definitions to a great extent explain themselves and need no comment. The provisions of sub-section 15 must always be borne in mind, as must also the opening words of the section "unless there is anything repugnant in the subject or context." It is also to be observed that in some sub-sections the word "means" is used, which makes the definition exhaustive, while in others the word used is "includes," which makes the definition somewhat more elastic.

Buyer and Seller.—These two terms are complementary, and represent the two parties to a contract of sale. Although, therefore, the parties to a conditional contract of sale may properly be spoken of as "seller" and "buyer" respectively, a person who has merely an option to sell or buy is not a seller or buyer within the meaning of the definition; for even if the option be irrevocable by the party who granted it there is no contract of sale until that option is exercised (*m*). The context of section 24 shows that "buyer" is not there used in the sense of the definition, as the person there called the buyer is in law a bailee in possession of goods with an option to purchase. The hirer in possession of goods under a hire-purchase agreement is in the same position. These distinctions are of importance when the rights of third parties come in question under section 30.

In chapter V of the Act "seller" has a wider signification and includes any person who is in the position of a seller (*n*).

Delivery.—Sir Frederick Pollock has defined "delivery" as "voluntary dispossession in favour of another" and points out that "in all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he held himself immediately

(*m*) *Helby v. Matthews* (1895) A.C. 471; | 80 R. R. 588.
Manders v. Williams (1849) 4 Ex. 339, | (*n*) S. 45 (2).

before that act" (o). No attempt is made to define "possession," as it is too elusive a term to define. It often includes actual custody and in the English Factors Act, 1889, possession is defined as "custody." On the other hand, when goods are in the actual custody of a servant, the master alone is legally in possession of them and the custody of the servant is not regarded by the law as the possession of the servant (p), hence the common law rule that a servant who has the custody of his master's goods can, if he misappropriates them, be convicted of larceny, an offence which involves the trespassory taking of possession. And possession may exist without actual custody, consequently an owner of goods is said to be in possession of them though they are in the actual custody of a bailee at will, or a carrier (q). But although it is scarcely feasible to give a definition of possession (r), it is usually possible to ascertain when possession ends and begins, though even that question occasionally gives rise to difficulties (s). Sometimes the question of possession has to be decided by attributing it to the person who has the title (t). As the transfer of possession has to be voluntary in order to constitute a delivery, a person who obtains possession by means which amount to a trespass, for instance a thief, does not obtain possession by delivery. Rather subtle questions arise on this point and they are further discussed in the notes to section 27.

The effect of the transfer of possession differs in different circumstances. It may, whether the delivery be made to the buyer or to some carrier or other agent on his behalf, have the effect of passing the property to him (sec. 23), of discharging the seller's obligation under the contract to deliver (sec. 39) and of divesting the seller's lien (sec. 49 (1) (a)), subject to the qualification contained in section 37 (2).

But in order to defeat the seller's right of stoppage in transit, a delivery must be made to the buyer or some other agent of his other than a carrier or other bailee for the purpose of transmission to the buyer. In cases, therefore, which deal with the right of stoppage in transit, it is often said that there has been no delivery; but this is not quite an accurate expression, for there may have been delivery in one of the above senses, though it may not have been a delivery which has the effect of defeating the right of stoppage in transit.

(o) Pollock & Wright on Possession, pp. 43, 46. See further notes to s. 33.

(p) See *Biddomoye v. Sittaram* (1879) 4 Cal. 497.

(q) *Gordon v. Harper* (1796) 7 T. R. 9, 4 R. R. 369. *Aliter*, if they are in the custody of a bailee when the contract of bailment cannot be terminated at the will of the bailor: *ibid*.

(r) For a full discussion of the meaning

of the term as used in the Indian Contract Act, see *Haji Rahimbox Ashan Karim v. Central Bank of India* (1928) 56 Cal. 367, 119 I. C. 23, (29) A. C. 497.

(s) *Gt. E. Rly. Co. v. Lord's Trustee* (1909) A. C. 109.

(t) *French v. Gething* (1921) 3 K. B. 280, affirmed (1922) 1 K. B. 236, C. A.; *Seager v. Hukma Kessa* (1900) 24 Bom. 458.

Documents of title to goods.—The Indian Contract Act used the different phrases, “document showing title,” “instrument of title,” and “document of title” to goods. In *Ramdas Vithaldas v. Amerchand & Co.* (u) the Judicial Committee considered the effect of this difference in terminology and laid down, after referring to the expression “document of title to goods” as defined in the Indian Factors Act XX of 1844, (which was repealed by the Indian Contract Act) that whenever any doubt arose as to whether a particular document was a document “showing title” or a document “of title” to goods for the purpose of the Indian Contract Act, the test was whether the document in question was used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. The question in the case was whether a railway receipt, which entitled the endorsee to delivery, was an instrument of title to goods within the meaning of section 103 of the Indian Contract Act. This, it was held, satisfied the tests laid down above, and was “a document showing title” to goods, a “document of title” and “an instrument of title,” within sections 102 and 108, 178 and 103 respectively. After referring to sections 102, 103, 108 and 178 their Lordships said: “Sections 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Factors Act XX of 1844, which, with certain modifications not material for the purposes of this appeal, made the provisions of the English Factors Act, 1842, applicable to British India. Both the last mentioned Acts use the expression ‘document of title to goods’ and define it as including any bill of lading, dock warrant, warehouse-keeper’s certificate, wharfinger’s certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented. In their Lordships’ opinion the only possible conclusion is that, whenever any doubt arises as to whether a particular document is a ‘document showing title’ or a ‘document of title’ to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not, and indeed cannot,

(u) (1916) L. R. 43 I. A. 164, 168-169, 40 Bom. 630, 18 Bom. L. R. 670, 35 I. C. 954, (16) A. P. C. 7, affirming (1913) 38 Bom. 255, 21 I. C. 343; *Dolatram v. B. B. & C. I. Railway Co.* (1914) 38 Bom.

659, 25 I. C. 380; *Fakeerappa v. Thippanna* (1913) 38 Mad. 664, 30 I. C. 950; *Jalan and Sons, Ltd. v. Governor-General in Council* (1919) A. P. 190.

S. 2 be disputed before this Board, that the railway receipts in question satisfy this test."

The present definition is based upon that judgment and is wider than that of the English Factors Act, 1889, as it includes not only wharfingers' certificates (which, however, are covered by the term warehouse-keepers' certificates in the English Act) but also railway receipts. That judgment, however, makes it clear that the words "used in the ordinary course of business" to the end of the sub-section are all-important, and govern the whole sub-section, with the result that all the documents mentioned in it must be such as in the ordinary course of business represent the goods. A certificate signed by a warehouse-keeper or wharfinger which is merely an acknowledgment by him that the goods specified in it are in his possession and nothing more, though it may be described as a warehouse-keeper's or wharfinger's certificate, is not a document of title, and it does not represent the goods (v). Similarly, a document may amount to an undertaking to deliver goods, but it must be shown to be an undertaking made unconditionally to the holder of the document to deliver them, otherwise it will not be a document of title (w). But a document may be a document of title to goods even if it refers to unascertained goods (x).

Bill of lading.—Although there are various Acts dealing with bills of lading, there is no statutory definition of that term, but it was defined by Lord Blackburn in his book on Sale (y), as "a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage (subject to such conditions as may be mentioned in the bill of lading). The bill of lading is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns, sometimes to order or assigns, not naming any person, which is apparently the same thing, and sometimes to a consignee by name or assigns, but in all its usual forms it contains the word assigns."

At common law it partakes of the nature of a negotiable instrument in that by endorsing it the holder of the bill of lading can transfer the property in the goods to which it relates, and by parting with it he parts not only with the property in the goods, but with their possession: and in certain cases he can give a better title than he himself has. But it is not negotiable in the sense that a person who has no title to it can give to the endorsee or transferee a title to it or the goods which it represents, and moreover at common law the endorsee of a bill of lading could not

(v) *Gunn v. Bolckow Vaughan & Co.* (1875) L. R. 10 Ch. App. 491.

(w) *Farmeloe v. Bain* (1876) 1 C. P. D. 445. Contrast *Merchant Banking Co. v. The Phoenix Bessemer Steel Co.* (1877) 5 Ch. Div. 205.

(x) *Ant. Jurgens Margarinefabrieken v. Louis Dreyfus & Co.* (1914) 3 K. B. 40. cf. *Anglo-India Jute Mills v. Omademull* (1911) 38 Cal. 127, 10 I. C. 859.

(y) Blackburn on Sale, p. 338.

sue upon the contract contained in it (z). The law was thus stated by Lord Campbell, C. J., in the case of *Gurney v. Behrend* (a). "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for valuable consideration without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee for value cannot make a title under it as against the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." The cases in which the transferor can convey to the transferee a better title than he has himself are confined to those cases in which "the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest" (b), and it is by virtue of this doctrine that the endorsement of the bill of lading may defeat the unpaid vendor's right to stop the goods in transit, as to which see section 53.

Bills of Lading Act.—The common law rule that the assignee of the bill of lading could not sue upon the contract contained in it is abrogated by the Bills of Lading Act IX of 1856, the first two sections of which are as follows :—

- (1) Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.
- (2) Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

The result of that enactment is that the endorsee can both sue and be sued by the carrier upon the bill of lading. It is only, however, where the

(z) *Thompson v. Dominy* (1845) 14 M. & W. 403.

(a) (1854) 3 E. & B. 622, at pp. 633-4.

(b) *Rodger v. Comptoir d'Escompte de Paris* (1869) L. R. 2 P. C. 393, 405. Compare the wording of the proviso to s. 27, s. 30 (2) and s. 53 (1).

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property, as distinguished from some special property in the goods, is passed by the endorsement that the Act applies. In the case of *Sewell v. Burdick* (c) a bill of lading had been endorsed by way of pledge to a bank, but in the circumstances of the case the pledgees never applied for delivery of the goods to them and it was held that they could not be sued upon the contract contained in it. It appears, however, from the case of *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co.* (d), that if the pledgee presents the bill of lading and demands delivery of the goods by virtue of it, a contract may be inferred between him and the carrier to deliver and accept the goods according to the terms of the bill of lading, and the exceptions from liability in the bill of lading may be relied upon by the carrier, and, conversely, all circumstances, which would prevent him from relying upon such exemptions as against the original party to the bill of lading, will prevent him from relying upon those exemptions as against the assignee.

In effect, therefore, a pledgee of a bill of lading, who demands delivery of the goods, will be in the same position as if he had been a party to it, or as if it had been endorsed to him in such circumstances as to pass the property to him.

Dock warrant.—A dock warrant is a document issued by a dock or wharf owner at a merchant's request, setting out the detailed weights or measurements of a specific parcel of goods, and declaring or certifying that the goods are held to the order of the person named, or his assignee by endorsement.

Warehouse-keeper's certificate.—A warehouse-keeper's or a wharfinger's certificate is a document which is issued by the warehouse-keeper or wharfinger stating that certain goods which are specified in the certificate are in his warehouse, but to be documents of title they must, for the reasons already given, be in the nature of a warrant.

A wharfinger is a person who owns or keeps a wharf for the purpose of receiving merchandise with a view to its being shipped, and carries out these transactions in exchange for a rate of payment for hire.

Delivery order.—A delivery order is an order by the owner of goods to a person holding them on his behalf directing him to deliver them to a person named in the order. It must, however, be a document which represents the goods (e).

Railway receipt.—A railway receipt is a document issued by the railway company providing that it is to be given up at the destination of the goods by the consignee in return for the delivery to him of the goods

(c) (1884) 10 App. Cas. 74.
(d) (1924) 1 K. B. 575, C. A.

(e) *Laurie & Morewood v. John Duden & Sons* (1925) 2 K. B. 383, 390, Sankey, J.

named therein, and if he does not intend to take delivery himself he must endorse on the receipt a request for delivery to the person to whom he wishes it to be delivered (f). An unendorsed railway receipt is not a document of title ; but if a consignee gives a railway receipt to another person, the inference is that he appoints that other person his agent to take delivery of the goods from the railway company (g).

Mate's receipt.—Efforts from time to time have been made to include a mate's receipt among documents of title, and it was in fact suggested that it should be included in this definition while the Act was being considered. Hitherto, however, these efforts have failed, and it is not regarded as a document of title ; it is simply a document which acknowledges the receipt of the goods and is signed by the mate of the vessel when the goods are put on board, and is not a document representing the goods. *Prima facie* the holder of the mate's receipt is the person entitled to receive the bill of lading (h), but this is not necessarily the case, and the master of the ship may properly sign bills of lading in favour of the shipper of the goods without production of the mate's receipt if he is otherwise satisfied that the goods are on board the vessel, and has no notice that anyone but the shipper claims any interest in them (i).

The retention of the mate's receipt, however, may be evidence in determining the question whether the shipper intended to keep the right of disposal of the goods. As to this see notes to section 25.

Modification of the common law by the Act.—At common law there was an important distinction between a bill of lading and those other documents which by the definition are documents of title. "Those documents," wrote Lord Blackburn (j) "are generally written contracts, by which the holder of the endorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading ; but they differ from them in this respect, that when goods are at sea the buyer who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights ; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the

(f) See as to the incidents of a railway receipt in general, *M. & S. Rly. Co., Ltd. v. Haridoss Banmolidas* (1918) 41 Mad. 871, at pp. 881-883, 49 I. C. 69.

(g) *Secretary of State v. Rishi Ram Jagdish Prasad* (1927) 50 All. 227, 108 I. C. 457, (28) A. A. 145; *Shamji Bhanji & Co. v. North-Western Railway Co.* (1946) Bom. L. R. 698, (1947) A. B. 169.

(h) *Craven v. Ryder* (1816) 6 Taunt. 433, 16 R. R. 644; *Ruck v. Hatfield* (1822) 5 B. & Ald. 632, 24 R. R. 507.

(i) *Hathesing v. Laing* (1873) L. R. 17 Eq. 92; *Cowasjee v. Thompson* (1845) 5 Moo. P. C. 165, 70 R. R. 27. See also *Juggernath v. Smith* (1906) 33 Cal. 547, 559; *Natcheappa v. Irrawady Flotilla Co.* (1914) 41 Cal. 870, 22 I. C. 311.

(j) Blackburn on Sale, p. 415.

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goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an *actual delivery of possession*, and yet not give such an effect to the transfer of documents of title to goods on shore." As between seller and buyer, this is still the law, with the result that, while the transfer of the bill of lading by itself amounts to delivery of the goods by the seller to the buyer, so that the seller's lien is thereby destroyed, his handing to the buyer of other documents of title does not amount in itself to delivery and before the buyer can be said to be in possession of the goods, the bailee must attorn to him. It is when, and only when, such documents come into the hands of a third party that the position as it was at common law is altered. The transferee of such a document is now, as against the seller, in the same position as the transferee of the bill of lading was at common law (k).

Goods.—This definition is wider than that contained in the English Act, for it includes such things as stocks and shares, which in English law are not goods (l). The definition also makes it plain that things fixed to the land may, notwithstanding the definition of moveable and immoveable property in the General Clauses Act X of 1897 (m), be subject matter for a contract of sale of goods, provided that by the terms of the contract it is clear that they are to be severed from the land. In English law emblements, that is vegetable products which are the annual result of agricultural labour, were always considered to be "goods," but somewhat subtle distinctions were drawn in the case of the natural produce of the land, such as the fruit of fruit trees. These distinctions are not of any importance under this definition, and in England the importance largely consisted in this, that according as such products were regarded as goods or not, the contract for their sale fell within the 17th or within the 4th section of the Statute of Frauds. If the contract fell within the 17th section, part performance, as by the buyer taking away some of the goods sold was a sufficient compliance with the section to make the contract enforceable, but if the contract fell within the 4th section, it had to be evidenced by writing and part performance was insufficient. Contracts, however, by which things forming part of the soil itself, such as coal, or other minerals, or gravel or sand, may be removed by the buyer, are not contracts of sale of goods (n).

(k) See ss. 30, 36, 53.

(l) *Fazal v. Mangaldas* (1922) 46 Bom. 489, 66 I. C. 726, ('22) A. B. 303; *Maneckji Pestonji Bharucha v. Wadilal Sarabhai* (1926) 53 I. A. 92, 50 Bom. 360, 94 I. C. 824, ('26) A. P. C. 38; *Domingo v. DeSouza* (1928) 50 All. 695, ('28) A. A. 481.

(m) S. 3 of the General Clauses Act X of 1897 defines "moveable property" as property of every description except

immoveable property, and immoveable property includes "land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth."

(n) *Morgan v. Russell & Sons* (1909) 1 K. B. 357. If trees are sold with the object of being cut and removed within a reasonable time, it is a sale of moveable property. *Dan Singh v. Janki Saran* (1948) A. A. 396.

Not can the definition be used in order to override the definition of immoveable property so as to give a Court jurisdiction to try a case in substance relating to the title to immoveable property situate outside its territorial jurisdiction (o).

Decree.—The sale of a decree is a sale of goods (p).

Money.—Money is necessarily excluded from the definition, not only because it constitutes the price in exchange for which the goods are sold, but because it is governed by wholly different principles of law, owing to its being currency. It is not therefore regarded as a chattel, but as something *sui generis*. This is exemplified by the form of the indictment for larceny of money, which alleges that the thief stole such and such a sum of “the monies” and not “of the goods and chattels” of the prosecutor. It does, however, partake in a limited manner of the nature of a chattel when a definite sum is entrusted to another to use or lay out in a particular manner on behalf of the person who so entrusted it. In such a case the latter may treat the equivalent of the sum so entrusted as his property, and not merely as a debt due to him from the person to whom he entrusted it. He may, therefore, follow it if it is lent or given away to another, or otherwise dealt with contrary to his instructions; for instance, he may claim as his own or obtain a charge upon any property purchased with it (q). But when once it has passed in currency, it cannot be followed (r).

Ships.—Ships are subject to so many special rules that many of the provisions of the Act are inapplicable to the sale of ships, but in other respects they are goods within the meaning of the definition (s).

Gas, Electricity, etc.—It is doubtful whether the Act is applicable to such things as gas, water and electricity (t).

Actionable claims.—“Actionable claims” are defined in section 3 of the Transfer of Property Act IV of 1882 and their transfer is governed by sections 130 to 137 of that Act.

Insolvency.—This definition is declaratory of the common law, under which insolvency was frequently held to mean a general inability

(o) *Swami Iyah Nadar v. Commissioners for the Port of Rangoon* (1930) 9 Ran. 13, 134 I. C. 511, (‘31) A. R. 109.

(p) *Vithaldas v. Jagjivan* (1939) 41 Bom. L. R. 33, 180 I. C. 858, (‘39) A. B. 84.

(q) *Taylor v. Plumer* (1815) 3 M. & S. 562, 16 R. R. 361; *Clarke v. Shee* (1774) Cowper 197; *re Strachan*; *ex parte Cook* (1876) 4 Ch. D. 123, C. A.; *re Hallett's Estate*; *Knatchbull v. Hallett* (1880) 13 Ch. D. 696, C. A.; *Sinclair v. Brougham* (1914) A. C. 398; *Banque Belge pour l'Etranger v. Hambrouk* (1921) 1 K. B.

321, C. A.

(r) See *Miller v. Race* (1758) 1 Burr. 452, 457.

(s) *Hooper v. Gumm* (1867) L. R. 2 Ch. App. 282, at p. 290; *Behnke v. Bede Shipping Co.* (1927) 35 Ll. L. R. 217, where it was assumed that the sale of a ship was within the provisions of s. 14 of the English Act, corresponding to s. 16 of the Act.

(t) This has received judicial approval in *Rash Behari v. Emperor* (1936) 41 C. W. N. 225, (‘36) A. C. 753.

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to pay one's debts (u), and "stopping payment" amounts to conclusive evidence of such inability, and probably failure to pay one admitted debt would be sufficient (v). The question of the insolvency of the buyer is of considerable importance in connexion with the seller's lien and right of stoppage in transit.

Mercantile agent.—This definition is the same as that contained in the English Factors Act, 1889, except that the word "his" is omitted before the word "business". In view, however, of the words, which immediately follow, "as such agent," it would appear that the omission is of no material consequence. The difference, however, between the language of this sub-section and of that of the proviso to section 27 is to be noted; the substitution of "a" mercantile agent for "such" mercantile agent in the latter section being of material significance (w). This sub-section deals only with the status of the agent and defines the circumstances in which he obtains his authority from his principal, that is, his actual authority, and not merely his ostensible authority: while the proviso to section 27, which concerns the rights of third parties who deal with him, refers to his ostensible authority.

The definition as given in the English Factors Act was recently considered by Wright, J., in the case of *Louther v. Harris* (x), where the plaintiff had a quantity of valuable furniture, including some tapestry, which he wished to sell, and accordingly arranged with one Prior to act as his agent for its disposal. Prior by fraud obtained possession of some of the tapestry, which was at the plaintiff's house, and sold it to the defendant and absconded with the money: but as the defendant acted in good faith, it became necessary to decide (*inter alia*) whether Prior was a mercantile agent: and it was held that he was. The learned Judge, in coming to that conclusion, reviewed the authorities as follows in his judgment, which is applicable to the present sub-section: "Various objections have been raised. It was contended that Prior was a mere servant or shopman, and had no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman: *Cole v. North Western Bank* (y), *Lamb v. Attenborough* (z), *Heyman v. Flewker* (a). I think this is still the

(u) *Parker v. Gossage* (1835) 2 C. M. & R. 617; *Biddlecombe v. Bond* (1835) 4 A. & E. 332, 43 R. R. 351. See per Willes, J., in *The Queen v. Saddlers' Co.* (1863) 10 H. L. C. 404, at pp. 425, 426, 138 R. R. 217, cf. *London and Counties Assets Co. v. Brighton Grand Concert Hall and Picture, Palace Ltd.* (1915) 2 K. B. 493, C. A.

(v) *Dixon v. Yates* (1833) 5 B. & Ad. 313, 39 R. R. 489; *Byrd v. Brown* (1850)

4 Ex. 786, 80 R. R. 775.

(w) See the note to that section, post p. 162.

(x) (1927) 1 K. B. 393, 398.

(y) (1875) L. R. 10 C. P. 354, 372 (goods warehoused with a warehouseman who was also a broker).

(z) (1862) 1 B. & S. 831, 124 R. R. 772 (wine merchant's clerk).

(a) (1863) 13 C. B. (N. S.) 519, 134 R. R. 629.

law under the present Act. In my opinion Prior, who had his own shops and who gave receipts and took cheques in his own registered business name and earned commissions, was not a mere servant but an agent, even though his discretionary authority was limited. It is also contended that even if he were an agent, he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous. The contrary was decided under the old Acts in *Heyman v. Flewker* (a¹), and I think the same is the law under the present Act. In *Weiner v. Harris* (b) it appears that the agent was not acting for any other principal than the plaintiff, and this was so also in *Hastings, Ltd. v. Pearson* (c), in respect of which case the Court of Appeal in *Weiner v. Harris* (d) held that the agent was a mercantile agent. It is also clear that pictures, as objects of purchase and sale, constitute those who deal in them on commission mercantile agents within the Factors Acts. See under the old Act *Heyman v. Flewker* (e) and under the present Act *Turner v. Sampson* (f)."

Property.—Property in the sense of general property may be defined as the sum of all the ways in which a moveable or immoveable thing can be lawfully used and enjoyed, and it includes the right to possession of it. It is perhaps unfortunate that the term "special property" instead of "special interest" became the term used in English law to describe the rights over a thing which fall short of the rights of the person who has the general property. The usage, however, is too well established to be altered, and consequently various rights over things such as the right of a pledgee to the thing pledged, the hirer of an article to the thing hired, and like rights, are all special property. Different interests may co-exist at the same time; the pledgor, for instance, still has the right which the general property confers upon the owner, diminished, however, by his having no right to have possession of the article, and the person who lets out an article is in the same position.

Quality of goods.—This definition becomes of importance in construing the words "merchantable quality" in section 16. For instance, if goods arrive in a damaged state so that they cannot be sold until the damage is repaired, they are, by virtue of this definition, not of merchantable quality.

Specific goods.—This definition is very precise, and despite suggestions to the contrary, it is at least doubtful whether it can ever be given a different meaning. See the notes to sections 7, 8 and 58. The goods

(a¹) (1863) 13 C. B. (N. S.) 519, 134 R. R. 629.

(b) (1910) 1 K. B. 285, C. A.

(c) (1893) 1 Q. B. 62. The decision in this case was to the contrary effect, but was

expressly overruled in *Weiner v. Harris*.
(d) (1910) 1 K. B. 285, C. A.

(e) (1863) 13 C. B. (N. S.) 519, 134 R. R. 629.

(f) (1911) 27 T. L. R. 200.

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must be actually identified : it is not sufficient that they are capable of identification (g). Where the contract is in respect of existing stocks of bidi leaves in the godowns of the seller at a particular place and the price is fixed at a lump sum for the amount of stock, the sale is of specific goods although the buyer may not have seen the goods (h). Goods which are not identified and agreed upon at the time when the contract is made are called "generic" or "unascertained" goods.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts for the sale of goods.

Application of provisions of Act IX of 1872.

Relation of sale to contract generally.—The effect of the provisions of this section and section 66 is that the law relating to the sale of goods is subject to the common law and the law merchant and in particular the Act continues to be a chapter of the Indian Contract Act, as much as were the sections of that Act which are now repealed. No provisions, therefore, are contained in the Act with reference to various matters with which it would have to deal if, like the English Act, it were a code by itself. Some of these matters, however, it is desirable briefly to mention, in so far as they relate to the contract of sale.

Capacity of parties.—This is governed by sections 11 and 12 of the Indian Contract Act (i) and the liability of persons incompetent to contract, such as minors and persons of unsound mind, to pay for necessities actually supplied to them is governed by section 68 of that Act (j). There is, therefore, nothing in the Act which corresponds to section 2 of the English Act, the terms of which are as follows :—"Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessities are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery." The effect of this provision is that in an action against such a person the onus is on the plaintiff to prove both that the goods supplied were suitable to the condition in life of the defendant and that the defendant was not sufficiently supplied with goods of that class at the time when they were

(g) *Kursell v. Timber Operators & Contractors, Ltd.* (1927) 1 K. B. 298, C.A., at p. 314, per Sargant, L. J.
(h) *Harnarain Ramchandra Jaiswal v.*

Firm Radhakisan Narayandas ('49) A.N. 178.

(i) Pollock and Mulla, pp. 60-75.

(j) Pollock and Mulla, pp. 358, 359.

delivered, not merely at the time when the contract was made, and it is immaterial whether the plaintiff did or did not know of the existing supply (*k*). The term "necessaries," however, includes necessities delivered to a person whom the minor or other person under incapacity is legally bound to support (*l*). As the definition of "necessaries" in the English Act is declaratory of the common law (*m*), it may be presumed that, so far as the supply of goods is concerned, the Indian Courts will adopt it, although section 68 of the Indian Contract Act is silent as to the actual requirements of the person supplied with the goods (*n*). In general, however, the English and Indian law have the same result, except that in India the remedy is against the property of the incompetent person only, and not against him personally, as it may sometimes be in English law: the seller can only recover for necessities actually supplied, and what he may recover is a reasonable price, which is not necessarily the stipulated price, and the obligation to pay that price is imposed by law, and arises *quasi ex contractu* not *ex contractu*, *re not consensu* (*o*). Payment for goods, even though they be necessities, if they are not supplied, cannot be enforced either in an action for the price or for damages for non-acceptance: and nothing can be recovered in respect of goods which are not necessities, even though supplied and actually used: though if an infant obtains them by fraudulently representing himself to be of age he may be compelled to return them or, if he has sold them, to account for the proceeds (*p*): but it is conceived that as far as the law relating to goods is concerned the Indian Courts will, like the English (*q*), refuse to enforce the contract indirectly by decreeing a money compensation in any form of action, notwithstanding their more extensive powers to give equitable relief than exist in England: and will not allow the contract to be indirectly enforced by permitting the seller to recover in any action framed *ex delicto* (*r*).

The ignorance of the other party that he was dealing with an infant is no answer to the plea of infancy, but in the case of a person *non compos mentis* in order that the plea of lunacy may succeed in England it is necessary that the other party should be aware of the infirmity at the time of making the contract (*s*). But as by Indian law the contract of such

(*k*) *Nash v. Inman* (1908) 2 K. B. 1, C. A.

(*l*) *Chapple v. Cooper* (1844) 13 M. & W. 252, 259, 67 R. R. 586.

(*m*) See *Ryder v. Wombwell* (1868) L. R. 4 Ex. 32, Ex. Ch.; *Johnstone v. Marks* (1887) 19 Q. B. D. 509, approving *Barnes v. Toye* (1884) 13 Q. B. D. 410.

(*n*) See *Jagon Ram v. Mahadeo Prasad* (1909) 36 Cal. 768, 1 I. C. 724; *Pollock and Mulla*, pp. 71, 72.

(*o*) *Re Rhodes* (1890) 44 Ch. Div. 94, C. A.; *Nash v. Inman* (1908) 2 K. B. 1, at p. 8.

(*p*) *Stocks v. Wilson* (1913) 2 K. B. 235.

(*q*) See *Leslie v. Sheill* (1914) 3 K. B. 607, C. A.

(*r*) See *Pollock and Mulla*, p. 67; *Khan Gul v. Lakha Singh* (1928) 9 Lah. 701, 111 I. C. 175, ('28) A. L. 609.

(*s*) *Imperial Loan Co. v. Stone* (1892) 1 Q. B. 599, C. A.

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a person is void, it would seem that the ignorance of the other party of his condition is immaterial (t).

In England an infant or other person under incapacity may enforce a contract and the seller will be liable if he refuses to deliver goods which he has contracted to sell in an action brought by such a person, but again as by Indian law such contracts are void and not merely voidable, it does not appear that a contract of sale can be enforced against the adult seller (u).

Where however the contract has been completely performed, and the goods delivered and paid for, it would appear that the transaction must stand. This is undoubtedly the law in England, and would appear to be the law in India (v).

Illegality.—Sections 23 and 24 of the Indian Contract Act are applicable to contracts of sale, hence a contract for the sale of an obscene or libellous book or picture or print is unenforceable. So, too, are contracts for the sale of goods, which, though innocent in themselves, the buyer intends, to the knowledge of the seller, to put to some illegal use, for “no man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them” (w). The seller, therefore, in such a case cannot be sued for failure to deliver the goods, nor if he has delivered them can he recover the price. Where the parties are not *in pari delicto*, as when a buyer buys goods, innocent in themselves, but for an unlawful object, unknown to the seller, the buyer cannot defend himself by pleading his own illegal purpose, for “no man shall set up his own iniquity as a defence any more than as a cause of action” (x). It follows from this that the innocent seller may lawfully repudiate the contract on discovering the illegal object of the buyer (y). But if the parties are *in pari delicto*, the illegality may be relied on by the party sued. “The Court does not sit to enforce illegal contracts. There is no question of estoppel :

(t) *Molyneux v. Natal Land Co.* (1905) A. C. 555, P. C., a case under Roman-Dutch law, under which also contracts by lunatics are void.

(u) The English authorities almost exclusively relate to purchases by infants and others under incapacity. An infant seller, however, is not liable on a trading contract; *Cowern v. Nield* (1912) 2 K. B. 419. As to an infant seller setting aside a sale of immoveable property which he had brought about by fraudulently representing that he was of full age, see *Appaswami Ayyangar v. Narayanaswami Ayyar* (1931) 54 Mad. 112, 129 I. C. 51, (30) A. M. 945.

(v) Pollock and Mulla, p. 341 and cases there cited in note (l). See also *Hamilton*

v. Vaughan-Sherrin Electrical Engineering Co. (1894) 3 Ch. 589, at pp. 593-4; *Pearce v. Brain* (1929) 2 K. B. 310 (a case of barter).

(w) *Lightfoot v. Tenant* (1796) 1 B. & P. 551, 556, 4 R. R. 735, 737; cf. *Langton v. Hughes* (1813) 1 M. & S. 593, 14 R. R. 531; *Pearce v. Brooks* (1866) L. R. 1 Ex. 213.

(x) *Montefiori v. Montefiori* (1762) 1 Wm. Bl. 363, per Lord Mansfield; cf. *Fergusson v. Norman* (1838) 5 Bing. N. C. 76, 50 R. R. 613, where the defendant, who alone had been guilty of illegal conduct, was unable to set up a lien against the assignees in bankruptcy of the owners of the goods.

(y) *Cowan v. Milbourn* (1867) L. R. 2 Ex. 230.

it is for the protection of the public that the Court refuses to enforce such a contract " (z) : when, therefore, the illegality of the contract is brought to the notice of the Court, whether by the plaintiff or defendant or otherwise, the Court will not give its assistance to the plaintiff if the illegality be the foundation of his claim (a).

It must be noted that the above considerations apply only to the enforceability of the contract, and the mere fact that a person has acquired goods under an illegal contract does not entitle other people to interfere with his possession of them. In such a case the plaintiff has no necessity to set up the illegal contract as the foundation of his right ; he may rely simply on his title, and the Court will recognize it and will not allow a stranger to go into the question as to how he acquired it (b).

Infringement of revenue laws.—The matter is somewhat more complicated when the contract involves infringement of the revenue laws, for the rights of foreign subjects may then come into question. The rules applicable to such cases appear to be as follows :—If all the parties are subject to Indian law and privy to the illegal purpose, the contract cannot be enforced by the Indian courts (c) ; and if the contract, for instance involves smuggling goods into India and is to be completed by delivery of the goods in India, the contract will be illegal and cannot be enforced in India at the suit of the seller, even if he be a foreigner, assuming that he was privy to the illegal purpose, for in this case India is the place of performance, of the contract and the Indian law therefore governs it. Moreover, even if the contract were both made abroad and completed abroad, the foreign seller cannot recover under it if he actively aided a buyer to carry out his illegal purpose of smuggling the goods into India (d). But where the contract is made and completed abroad and the foreign seller takes no part in furthering the illegal purpose he may recover (e).

Illegality by foreign law.—On the other hand the Court does not take notice of the revenue laws of foreign states and the mere fact that the performance of a contract may infringe those laws will not render the contract illegal by the law of India. But if the contract is to be performed in a foreign country and performance involves infringement of the law, other than the revenue laws, of that country, the illegality by the foreign

(z) *Re Mahmoud & Ispahani* (1921) 2 K. B. 716, 729, per Scrutton, L. J.

(a) See for instance, *Taylor v. Chester* (1869) L. R. 4 Q. B. 309; *Berg v. Sadler & Moore* (1937) 2 K. B. 158.

(b) *Gordon v. Chief Commissioner of Police* (1910) 2 K. B. 1080, C. A. The property may pass even under an illegal contract, *Scarfe v. Morgan* (1838) 4 M.

& W. 270, 281, 51 R. R. 568; cf. *Elder v. Kelly* (1919) 2 K. B. 179.

(c) *Biggs v. Lawrence* (1789) 3 T. R. 454, 1 R. R. 740.

(d) *Clugas v. Penaluna* (1791) 4 T. R. 466, 2 R. R. 442; *Waymell v. Reed* (1794) 5 T. R. 599, 2 R. R. 675.

(e) *Holman v. Johnson* (1775) 1 Cowp. 341; *Pellecat v. Angell* (1835) 2 C. M. & R. 311, 41 R. R. 723.

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law will be a defence to an action brought for non-performance in an Indian court (f).

It must be observed, moreover, that the Court of Appeal in England recently held a contract to equip and load a ship with a cargo of whisky, with the object of selling it in the United States in violation of the law of that country, to be void, as against the principles of international comity, and therefore, contrary to public policy (g). This is a strong case for, though it was not merely a revenue law of a foreign state that it was proposed to violate, usually speaking "illegality according to the law of a foreign country does not affect the merchant" (h), when performance of the contract does not itself involve an infringement of that law.

Other causes of illegality.—A contract of sale may also be in substance a wagering contract and therefore void under section 30 of the Indian Contract Act, as when the ascertainment of the price really involves a wager (i), or in the case of time bargains, when there is no real intention to deliver and accept delivery of the goods but to gamble in differences (j). In certain cases also the contract may be void if and in so far as it is in restraint of trade under section 27 of the Indian Contract Act: but on the whole an attempt to invalidate a contract of sale of goods on this ground is not usually successful. Generally it takes the form of the seller exacting from his buyer a promise not to resell the goods at less than a named price: and the Courts are not anxious to find that such an agreement is unreasonable as between the parties (k), though it is possible that it may be void as against the interests of the public in that it creates a pernicious monopoly (l). But the onus of proving this is on the party impeaching the contract and it is a heavy onus, at any rate if as between the parties the contract is a reasonable one. Such restrictions moreover, do not bind a sub-buyer from the original buyer, even if he has notice of them, for there is no privity between him and the original seller, and conditions cannot be attached to goods (m): though in the case of patented goods, the sub-buyer may be bound by such conditions, but only if he has notice of them (n).

(f) *Ralli Brothers v. Compania Naviera Sota y Aznar* (1920) 2 K. B. 287, C. A. In this case Scrutton, L. J., intimated that the rule by which the infringement of the revenue laws of a foreign state was ignored required reconsideration.

(g) *Foster v. Driscoll* (1929) 1 K. B. 470, C. A., reviewing the cases on this subject.

(h) *British & Foreign Marine Insurance Co. v. Sanday* (1916) 1 A. C. 650, 672.

(i) *Brogden v. Marriott* (1836) 3 Bing. N. C. 88, 43 R. R. 599; *Rourke*

v. Short (1856) 5 E. & B. 904, 103 R. R. 798.

(j) See notes to section 6 (2).

(k) *Elliman v. Carrington* (1901) 2 Ch. 275; *Palmolive Co. v. Freedman* (1928) Ch. 264, C. A.

(l) *Attorney-General of Australia v. Adelaide S. S. Co.* (1913) A. C. 781, at p. 796, P. C.

(m) *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* (1915) A. C. 847.

(n) *National Phonograph Co. of Australia v. Menck* (1911) A. C. 336, P. C.

Effect of war.—All intercourse with an alien enemy is contrary to law and any contract of sale between a British subject and an alien enemy is therefore void (o) and cannot be enforced even after conclusion of peace (p), and an executory contract, made before war, which involves intercourse with an enemy, is dissolved by the declaration of war (q). The place of business or residence is the test, so that any one residing voluntarily in hostile territory is regarded as an alien enemy (r).

Other causes invalidating the contract.—As between the immediate parties to the contract, the general rules relating to fraud and coercion contained in sections 13 to 19 of the Indian Contract Act apply to contracts of sale (s): the peculiar complications which arise when the rights of third parties become involved being dealt with by sections 27 to 30 of the Act. Mistake also may avoid the agreement, on the principles laid down in sections 20 to 22 of the Indian Contract Act (t).

To constitute a contract there must be "an agreement enforceable by law" (u), and it is competent for the parties to make arrangements relating to the sale and purchase of goods and expressly declare that such arrangements shall impose no legally enforceable obligation on either of them. Such arrangements, therefore, are not contracts; but if goods are actually supplied in pursuance of the terms of such an arrangement, the seller may enforce the payment of the price by an action (v).

Assignment.—Neither the Act nor the Indian Contract Act contains any provisions relating to the assignment of contracts; consequently the rules governing the assignability of, and the effects of assigning, a contract of sale depend upon general principles of law, and these are fully discussed in the commentary to the Indian Contract Act, pp. 245-249. Assignment must be distinguished from novation, as to which see sec. 62 of the Indian Contract Act and the commentary thereon, p. 323 *et seq.*

(o) *Brandon v. Nesbitt* (1794) 6 T. R. 23, 3 R. R. 109; *Potts v. Bell* (1800) 8 T. R. 548, 5 R. R. 452, Ex. Ch.

(p) *Willison v. Patteson* (1817) 7 Taunt. 439, 18 R. R. 525.

(q) *Esposito v. Bowden* (1857) 7 E. & B. 763, 110 R. R. 822, Ex. Ch.; *Ertel Bieber & Co. v. Rio Tinto Co.* (1918) A. C. 260; *Abdul Razack v. Khandi Row* (1917) 41 Mad. 225, 40 I. C. 851.

(r) *Janson v. Driefontein Consolidated Mines* (1902) A. C. 484, at p. 505; *Porter v. Freudenberg* (1915) 1 K. B. 857, C. A. As to companies, see *Daimler Co. v. Continental Tyre Co.* (1916) 2 A. C. 307.

For a full discussion of the question of illegality, see *Pollock & Mulla*, pp. 133-178 (illegality), 197-205 (restraint of trade), 215-234 (wagering contracts) 313-316 (dealings with enemies).

(s) *Pollock & Mulla*, pp. 76-124.

(t) *Op. Cit.*, pp. 134-143; *Scriven Bros. v. Hindley & Co.* (1913) 3 K. B. 564; *Smith v. Hughes* (1871) L. R. 6 Q. B. 597; *Raffles & Wichelhaus* (1864) 2 H. & G. 906, 133 R. R. 853; *Bell v. Lever Bros., Ltd.* (1932) A. C. 161.

(u) Indian Contract Act, s. 2 (h).

(v) *Rose & Frank v. Crompton Bros.* (1925) A. C. 445.

CHAPTER II.

FORMATION OF THE CONTRACT.

Contract of Sale.

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4. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

Sale and agree-
ment to sell.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Examples.—The section may be illustrated by the following examples :—

(1) *A* agrees to buy from *B* a haystack on *B*'s land, with liberty to come on to *B*'s land to take it away. This is a sale and *B* cannot revoke the licence given to *A* (*w*).

(2) Agreement by *A* to buy 20 tons of oil from the seller's cisterns. The seller has many cisterns with more than 20 tons in them. This is merely an agreement to sell (*x*).

(3) Agreement for the sale of a quantity of nitrate of soda to arrive *ex* a certain ship. This is an agreement to sell at a future date subject to the double condition of the arrival of the ship with the specified cargo on board (*y*).

(4) *A* agrees to lend to *B* an instrument on the terms that, if it is injured while in *B*'s possession, *B* is to pay an agreed sum as its value and keep it. This is a conditional sale and if it is so injured *A* may

(w) <i>Wood v. Manley</i> (1839) 11 A. & E.	176, 14 R. R. 735.
34, 52 R. R. 271.	(y) <i>Johnson v. Macdonald</i> (1842) 9
(x) <i>White v. Wilks</i> (1813) 5 Taunt.	M. & W. 600, 60 R. R. 838.

recover the agreed sum in an action for the price for goods sold and delivered (z).

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(5) *A* supplied porter in casks to a customer upon the terms that the empty casks were to be returned at the customer's expense within six months from the date of invoice, or paid for at the invoice price at the option of *A*. This is not a conditional sale. As soon as the casks are empty the customer becomes a bailee of them and *A* has an option to sell; and it is only on his exercising that option that the sale takes place (a).

This section replaces sections 77-78 of the Indian Contract Act, and is identical with section 1 of the English Act (except for the fact that the latter contains a definition of "price"), which is declaratory of the common law.

Essential requisites of sale.—The exchange of property for a money price is the essential object of the contract of sale. There must be a transfer of property or an agreement to transfer it from one party, the seller, to the other, the buyer, in consideration of a money payment or a promise thereof by the buyer. Exchange of property for something else than money is not a sale. A contract to barter one kind of goods for another would not under the old common law system of pleading support an action for goods sold and delivered (b). But if the exchange is made partly for goods and partly for a price the contract would appear to be one of sale (c). Similarly, if the exchange is made for goods or alternatively for a price (d). Similarly there must be saleable property to be transferred in exchange for the price, accordingly money cannot be the price of money. The change of a Government currency note for money is not a contract of sale, for it amounts to an exchange of money in one form for money in another form. "Either form being legal tender it is impossible to say that one is the price of the other" (e). Foreign money or currency and coins of denominations or issues formerly current in the jurisdiction, but no longer so, are, however, chattels which can be bought and sold (f), and where foreign money is taken in exchange for any other kind of chattel (unless it has been made legal tender and perhaps unless it is current by custom at a settled rate) the transaction is not a sale, but barter. And where goods were sold to be paid for by a bill, not drawn

(z) *Bianchi v. Nash* (1836) 1 M. & W. 545.
(a) *Manders v. Williams* (1849) 4 Ex. 339, 80 R. R. 588.

(b) *Harrison v. Luke* (1845) 14 M. & W. 139.

(c) *Aldridge v. Johnson* (1857) 7 E. & B. 885, 110 R. R. 875; *Sheldon v. Cox* (1824) 3 B. & C. 420; *G. J. Dawson (Clapham) Ltd. v. H. & G. Dufield* (1936) 2 A. E. R. 232.

(d) *South Australian Insurance Co. v. Randell* (1869) L. R. 3 P. C. 101.

(e) *Empress v. Joggeessur Mochi* (1878) 3 Cal. 379; *Mathra Dass v. Ramanand* (1878) Punj. Rec. No. 73; *Kanshi Ram v. Secretary of State for India* (1890) Punj. Rec. No. 83; *Dasaundi v. Imam-ud-Din* (1905) Punj. Rec. No. 18.

(f) *Moss v. Hancock* (1899) 2 Q. B. 111.

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or accepted by the buyer, without recourse to the buyer in case of its not being paid, the transaction was held to be barter and not sale (g).

✓ As there must be a complete change of property to constitute a sale, it follows that a seller and buyer must be different people. It is provided that one co-owner may sell to another and therefore a partner may sell to his firm and the firm may sell to a partner (h), but in the case of a member of an ordinary club paying for a meal at the club or even for provisions which he may carry away, there is no sale; the transaction is a release of the joint interest of the other members of the club and the only contract involved is the contract made once and for all by the member on his admission to use the property of the club only on the conditions laid down or authorised in its rules and usages (i). Members of a club or voluntary society are undivided joint owners, not part owners.

It follows equally that a man cannot buy his own goods and, therefore, if, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him, the transaction is nugatory. "The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is *naturali ratione inutilis*" (j).

There are certain apparent exceptions to this rule; for where a man's goods are sold under an execution or distress he may purchase them, and similarly a bankrupt may buy back his own goods from his trustee, but the trustee, the distrainer or the sheriff cannot be the buyer (k).

It would appear, therefore, where a person has the legal right to sell the goods of another, that other may become the buyer, but the person authorized to sell may not, in accordance with the general rule of law that an agent may not sell to himself (l).

Contract of sale distinguished from contract for work.—Many difficulties have arisen in England and in other common law jurisdictions as to the effect of a contract to make a chattel and deliver it when made. These difficulties were partly due to the old system of pleading under which a plaintiff might lose his cause if he sued, *e.g.*, for work and labour when he should have sued for goods bargained and sold or goods sold and delivered, and partly to the requirements of the 17th section of the Statute of Frauds

(g) *Read v. Hutchinson* (1813) 3 Camp. 351.

(h) *Re Maclaren; ex p. Cooper* (1879) 11 Ch. Div. 68, C. A.

(i) *Graff v. Evans* (1882) 8 Q. B. D. 373; *Davies v. Burnett* (1902) 1 K. B. 666; *Humphrey v. Tudgay* (1915) 1 K. B. 119; *Melford v. Edwards* (1915) 1 K. B. 172.

(j) *Bell v. Lever Bros. Ltd.* (1932) A. C. 161, 218, per Lord Atkin, citing *Cooper v. Phibbs* (1867) L. R. 2 H. L. 149.

(k) *King v. England* (1864) 4 B. & S. 782; *Plasycod Collieries Co. v. Partridge Jones & Co.* (1912) 2 K. B. 345. (Cases of the distrainer taking the goods at their appraised value); *Moore v. Singer Mfg. Co.* (1904) 1 K. B. 820, C. A. (The distrainer buying the goods at the auction). The sheriff may lawfully sell to the execution creditor, *ex parte Villars* (1874) L. R. 9 Ch. App. 432.

(l) *Kilson v. Hardwick* (1872) L. R. 7 C. P. 473.

now replaced in England by section 4 of the English Sale of Goods Act, whereby one of certain special kinds of proof was, and in many jurisdictions still is, necessary to establish a right of action on the contract for the sale of goods above a certain value. Such points cannot arise in India in the same manner, but the decisions are still instructive on the principles involved.

Generally a contract to make a chattel and deliver it, when made, includes a contract of sale, but not always. The test would seem to be whether the thing to be delivered has any individual existence before delivery as the sole property of the party who is to deliver it. Examples are perhaps best given in the form of illustrations :

- (1) *A* promises to make a set of false teeth for *B* with materials wholly found by *A*, and *B* promises to pay for them when made. This is a contract for the sale of goods (*m*).
- (2) *A* promised to paint a picture for *B*, *A* finding the paint and canvas which are of small value, and *B* promised to pay for the picture as a work of art. This is a contract for work and labour and not for the sale of goods (*n*). The reason is that the substance of the contract was that skill and labour should be exercised upon the production of the portrait and that it was only ancillary to the contract that there would pass from the artist to his customer the paint and the canvas.
- (3) *A* promises to carve a block of marble belonging to *B* into a statue. This is not a contract of sale, however much the value of the marble may be increased by *A*'s work.
- (4) *A* promises to print and deliver to *B* five hundred copies of a MS, which *B* entrusted to him for that purpose, on paper and with ink furnished by *A*. This is a contract for work and not for the sale of goods (*o*). So it is, more obviously, where a tailor makes up a customer's cloth and adds trimmings, buttons and the like from his own stock.
- (5) *A* is employed by *B* to draw a conveyance on paper and with ink furnished by *A*. This is a contract for work and not for the sale of goods (*p*).

It will be observed that in the cases where there is no sale there is never a moment when the thing produced is as a whole the maker's absolute property, notwithstanding that part, or even the whole, of the materials may have been his property, whereas in the other case he might, if he found

(*m*) *Lee v. Griffin* (1861) 1 B. & S. 272, 124 R. R. 555; *Baretto v. Pruce* ('39) A. N. 19.

(*n*) *Robinson v. Graves* (1935) 1 K. B. 579. The dictum of Blackburn, J., in

Lee v. Griffin (1861) 1 B. & S. 278 doubted.

(*o*) *Clay v. Yates* (1856) 1 H. & N. 73, 108 R. R. 461.

(*p*) Per Blackburn, J., in *Lee v. Griffin*.

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it possible and profitable, and if not restrained by patent, copyright or any other similar branch of laws make in duplicate or in greater numbers chattels of the kind ordered, appropriate one at his will to fulfil the special contract, and sell the others to other persons (q). It may seem improbable that some things made to order should be saleable to any other purchaser, or, at any rate, that they should fetch a substantial price in the market, but that does not affect the law. Common experience moreover shows there are dealers who offer to buy almost anything, as for example, old artificial teeth.

But although the contract may be a contract to do work and not an order for a specific article, yet the property in the article produced may pass to the party giving the order. It has been decided that upon an architect being employed to carry out alterations in a building and preparing plans for that purpose, the property in these plans passes on payment of the remuneration provided under the contract (r).

Different opinions are held in several American jurisdictions of which an account may be found in Mr. Benjamin's treatise, but they are of no practical importance in India.

It has also been held that where the supposed vendor's labour and skill are really the principal object in the contract, as where he was employed not only to make but to invent the machine for a specific purpose, he can at all events recover the value of his work and materials independently of the question whether there was a contract of sale or not (s). But this seems of little importance in jurisdictions where the old forms of action are abolished or have never existed and no enactment similar to the Statute of Frauds is in force.

Sale or bailment.—In some cases there may be doubt at first sight whether there is a sale of goods (or if the equivalent is not in money, barter) or a bailment. Here the test is whether the party delivering the goods is entitled to the specific return of what he has delivered. If not, there is no bailment, although the party may be entitled to claim goods of like amount and quality, or goods or money at his election, for example, where wheat of several owners is delivered to a miller, who may grind and sell it, the parties describing the transaction as "storage" (t).

Sale or hire.—A common method of selling goods is by means of an agreement commonly known as a hire-purchase agreement, which is more accurately described as a hiring agreement coupled with an option to

(q) The remarks of Lord Penzance in *Dixon v. London Small Arms Co.* (1876) 1 App. Cas. at p. 653, though not precisely in point, seem to bear out this view.

(r) *Gibbon v. Pease* (1905) 1 K. B.

810, C. A.

(s) *Grafton v. Armitage* (1845) 2 C. B. 336.

(t) *South Australian Insurance Co. v. Randell* (1869) L. R. 3 P. C. 101.

purchase, that is to say, the owner lets out the chattel on hire and undertakes to sell it to the hirer on his making a certain number of payments. If that is the real effect of the agreement there is no contract of sale until the hirer has made the requisite number of payments, and until then the hirer is only a bailee. But many so-called hire-purchase agreements are in reality binding contracts to purchase, the price to be paid by instalments, and in those cases the contract is a contract of sale and not a contract of hiring (u). It must depend on the terms of the contract whether it is to be regarded as a contract of hiring or a contract of sale (v). The differences, however, are important when the rights of third parties come to be considered, as when the hirer disposes of the goods by purporting to sell them to a third party. If the contract is a contract of sale, the third party, if he acts in good faith, will be protected and obtain a good title against the original seller even though the instalments had not been paid (w), whereas if the contract was merely a contract of hiring with an option to purchase he will not, as the hirer under such a contract is not a buyer in the possession of goods under a contract of sale (x). It is to be observed, however, that in certain cases the hirer may assign his interest, and if he purports to sell the goods the owner will only be able to recover from the sub-purchaser who bought from the hirer the value of his, i.e., the owner's, interest and cannot recover the full value of the goods. Probably the Court in the exercise of its discretion would not order the defendant in such an action to return the goods, even though the return was claimed under the Specific Relief Act, but would allow him to satisfy the judgment by paying to the owner the value of the owner's interest, which would be the amount of hire and purchase money remaining unpaid (y). Moreover, under the hiring agreement the hirer has a right to return the goods at any time, and thereby relieve himself from any further obligation as regards the future instalments—a thing which he cannot do if the contract be a contract of sale (z). And in

(u) *Lee v. Butler*, *infra*; *Cole v. Nanalal Morarji* (1924) 49 Bom. 172, 92 I. C. 191, ('25) A. B. 18; *Bhimji N. Dalal v. Bombay Trust Corporation* (1930) 54 Bom. 381, 124 I. C. 800, ('30) A. B. 306; *Anand Singh v. Commercial Credit Corporation Ltd.* (1935) 160 I. C. 503, ('35) A. L. 861 (sale).

(v) *McEntire v. Crossley Brothers* (1895) A. C. 457, 467, and cases cited in the previous note and note (t); *Balmakund v. Narayan* (1934) 148 I. C. 793, ('34) A. O. 133 (hire purchase); *Tiwari v. Remington Rand Inc.* (1934) 150 I. C. 66, ('34) A. N. 151 (hire purchase); *Mohamed Iemal v. Provincial Automobile Co.* (1937) 171 I. C. 781, ('37) A. N. 198 (sale).

(w) S. 30 (2) post; *Lee v. Butler* (1893) 2 Q. B. 318, C. A.

(x) *Helby v. Matthews* (1895) A. C. 471; *Gopal Tukaram v. Sorabji Nusserwanji* (1904) 6 Bom. L. R. 871; *McKenzie & Co. v. Muhammad Ali Khan* (1929) 4 Luck. 510, 115 I. C. 102, ('29) A. O. 155; *Abdul Quadeer v. Watson & Sons Ltd.* (1930) 8 Rang. 236, 125 I. C. 361, ('30) A. R. 193, dissenting from *Maung Ba Oh v. Motor House Co. Ltd.* (1929) 7 Rang. 431, 120 I. C. 132, ('29) A. R. 368.

(y) *Whiteley & Co. v. Hilt* (1918) 2 K. B. 808, C. A.; *Belize Motor Supply Co. v. Cox* (1914) 1 K. B. 244; *Manikchand v. Berar Motor Supply Co.* (1938) 175 I. C. 337, ('38) A. N. 18 (hire purchase).

(z) *Mahabali Prasad v. H. N. Palmer* (1932) 54 All. 781, 141 I. C. 615, ('32) A. A. 607.

the case of a contract of sale, if the seller re-takes possession of the goods by reason of the instalments being in arrear, he cannot, usually speaking, recover the arrears (a), whereas in the case of a hiring agreement he can (b).

Sale or agency.—A question may arise whether a consignee of goods is the consignor's agent to sell the goods or a buyer of the goods from him. Every case must depend on its own facts : and the facts of a " sale or return business " (as to which see more under section 24) may be very near those of a *del credere* agency. The words used by the parties are not conclusive. Thus there are cases in which the so-called agent is well known to be a retailer. If a consignee is bound to account to the consignor for goods sold at a fixed rate and within a fixed time, he may dispose of them on any terms he chooses to make ; calling him an agent will not make him so ; he is a buyer (c). On the other hand one who guarantees payment of the price for goods disposed of by him is an agent, for if he were a buyer he would be directly liable for the price, and a man cannot guarantee his own debt (d).

A contract of sale is compatible with a distinct collateral contract between the same parties as to the buyer's subsequent use or disposal of the thing sold (e).

Conditional contracts.—Contracts are conditional when their enforceability against one or both parties depends upon the performance or fulfilment of some condition, and conditions may be either contingent or promissory (f).

Contingent conditions.—In the first case the promise of one or both parties to a contract may be dependent upon the happening of an uncertain event or upon the existence of a state of affairs at the time when performance is due, or upon the existence of a state of affairs not within the promisor's knowledge at the time of the making of the contract, without there being any promise or statement by him that the event will happen or that the state of affairs exists or will continue. If the event does not happen, or the state of affairs does not exist or continue, the promise cannot be enforced against him, and the other party is relieved

(a) *Hewison v. Ricketts* (1894) 63 L. J. Q. B. 711; *Attorney General v. Pritchard* (1928) 97 L. J. K. B. 561.

(b) *Brooks v. Beirns* (1909) 1 K. B. 99; *The Auto Supply Co., Ltd. v. Raghunatha Chetty* (1929) 52 Mad. 829, 121 I. C. 593, ('29) A. M. 884; *Abdul Quadeer v. Watson & Sons Ltd.*, *supra* note (x).

(c) *Ex parte White* (1871) L. R. 6 Ch.

App. 397, especially the judgment of Mellish, L. J. and *cf. W. T. Lamb & Sons v. Goring Brick Co., Ltd.* (1932) 1 K. B. 710, C. A.

(d) *Ex parte Bright* (1879) 10 Ch. D. 566, C. A.

(e) *McBain v. Wallace* (1881) 6 App. Cas. 588.

(f) See ss. 31-36, 51-55 of the Indian Contract Act. Pollock & Mulla, pp. 235-241, 291-305.

from further liability, though he has no right of action for the breach of the promise (g). Such conditions may be express, and in certain cases may be implied (h), and may be either precedent or subsequent, or in the language of the civil lawyers, suspensive or resolute: the former suspending the obligations of the promisor until the condition is fulfilled and discharging him if it is not fulfilled: the latter providing for the dissolution of the contract on the happening of the specified event. The contract may be contingent even though the contingency is one within the control of the promisor (i). Where the condition is one inserted for the benefit of both parties, it may only be waived by mutual agreement, but either party may waive a condition inserted for his benefit only (j): and may do so either expressly or by implication, as, for instance, by preventing its fulfilment. Thus, where the agreement was for the sale of a steam excavator, on the condition that it should prove capable of excavating 350 cubic yards of clay a day on a properly opened face of a railway cutting, which the buyer was conducting, and the buyer failed to provide a properly opened face, he was held to have waived the condition (k). And if a party waives a condition in his favour, he must give reasonable notice if he intends to insist upon it in the future (l). If, for instance, the seller agrees to sell goods to be delivered by instalments on the condition that the buyer shall give security for the price, and delivers the first instalment before such security is given, he is not entitled to refuse delivery of the second instalment, on the ground that the condition has not been complied with by the buyer, without giving the buyer reasonable notice of his intention to insist upon the performance of the condition (m).

Promissory conditions.—In the second class of case, the obligation of one party to perform his promise is dependent upon the performance by the other party of his promise, and that promise may take the form of a statement which he must make good, as well as a promise to do something in the future. In such cases the promise to be performed, or statement to be made good by the party making it, is a promissory condition, and its non-fulfilment not only relieves the other party from all his obligations under the contract, but may also give him a right of action. Such promissory conditions, as in the case of conditions of the other class, may

(g) *Jackson v. Union Marine Insurance Co.* (1874) L. R. 10 C. P. 125, at pp. 144-5.

(h) *Taylor v. Caldwell* (1863) 3 B. & S. 826, 129 R. R. 573; *Howell v. Coupland* (1876) 1 Q. B. D. 258, C. A.; *Sannidhi Gundayya v. Illoori Subbaya* (1926) 51 Mad. L. J. 663, 99 I. C. 459, ('27) A. M. 89, cf. ss. 7, 8 and 10.

(i) *Pollock & Mulla*, pp. 236-238.

(j) *Compare s. 13 (1).*

(k) *Mackay v. Dick* (1881) 6 App. Ca.

251, H.L. (Sc.). This was an instance of a condition subsequent, for the property in the machine had passed to the buyer on delivery. See *Colley v. Overseas Exporters* (1921) 3 K.B. 302, at p. 307, per McCardie, J.

(l) *Tyers v. Rosedale Co.* (1875) L.R. 10 Ex. 195.

(m) *Panoutsos v. Raymond Hadley Corporation of New York* (1917) 2 K.B. 473, C.A.

4. be express or implied. Those which are implied upon the part of the seller are laid down in sections 14 to 17 of the Act. They may be conditions precedent or subsequent: and may be waived by the party in whose favour they are inserted in the contract. It must depend upon the construction of the contract and the particular circumstances of the case to determine the question whether a statement made by a party is a mere representation, which forms no part of the contract, so that its untruthfulness will not amount to a breach of contract and will give no cause of action unless made fraudulently (n), or whether such statement is a promise forming part of the contract (o): and whether in the latter case it amounts to a condition, or merely to an independent promise, the breach of which will give the other party a right of action but will not entitle him to treat the contract as repudiated (p). The general rule is that where, from a consideration of the whole instrument, it is clear that the one party relied on his remedy and not on the performance by the other of that other's promise, such performance is not a condition precedent: but if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent (q). The rules relating to contracts in general are laid down in sections 51 to 55 of the Indian Contract Act, and in so far as they apply to contracts of sale of goods will be noticed under the appropriate sections.

Mortgage.—A mortgage of goods is in form and in strict law a conditional sale, but from the earliest times equity has regarded it as nothing more than a security. It therefore does not give that complete dominion to the mortgagee over the goods sold which is an essential part of the contract of sale, and is, therefore, not regarded as such and is expressly excluded from the operation of the Act by section 66 (3). But there may be a sale with a condition for re-sale to the original seller which need have nothing to do with a mortgage (r).

Pledge.—A pledge is still further removed from a contract of sale, as when the chattel is delivered to the pledgee, the general property is retained by the pledgor and the pledgee has only a right to sell the article pledged on the expiration of the time for which the loan secured by the pledge was granted, and after notice to the pledgor (s). A pledge, too, is entirely outside the Act, as is any other form of charge upon

(n) *Hopkins v. Tanqueray* (1854) 15 C.B. 130, 100 R.R. 271.

(o) *Bannerman v. White* (1861) 10 C.B. (N.S.) 844, 128 R.R. 953. The whole matter is fully discussed by Williams, J., delivering the judgment of the Exchequer Chamber in *Behn v. Burness* (1863) 3 B. & S. 751, 124 R.R. 794.

(p) See section 12, and the notes thereto, where the matter is more fully discussed.

(q) Per Jervis, C.J., *Roberts v. Brett* (1856) 18 C.B. 561, 107 R.R. 410.

(r) *Beckett v. Tower Assets Co.* (1891) 1 Q.B. 1, at p. 25, per Cave, J.

(s) See Indian Contract Act, ss. 172, 177: Pollock & Mulla, pp. 515-520.

personal goods or any other form of security in which they play a part.

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Sale and agreement to sell.—By sub-section (1) the term contract of sale includes both an actual sale and an agreement to sell, and sub-section (3) defines the difference between the two.

An agreement to sell, which is also called an *executory contract of sale*, is a contract simply, and creates only a *jus in personam*, and the property in the goods which form the subject matter of the contract remains in the seller, so that they may be taken in execution for his debts, and belong on his bankruptcy to his trustee in bankruptcy: if they are destroyed the loss will, in the absence of express agreement, have to be borne by him: and a breach by either party of the agreement will normally only give the other party a right to sue for damages.

But it is competent for the parties when the subject matter of the contract is specific goods to transfer the property therein by the contract itself, and, if such is the effect of the contract, the contract is an actual sale and is often called a “bargain and sale” and also an executed contract of sale. The contract then besides creating a *jus in personam* transfers a *jus in rem*; it operates as a conveyance of the goods to the buyer and they become his: if they are destroyed, he normally must bear the loss: they are liable to satisfy his creditors. He may be sued for the price, even though the goods have not been delivered to him, and on the other hand, if the seller wrongfully refuses to deliver them, he has not only the personal remedy against the seller but also proprietary remedies in respect of the goods themselves, and in certain cases may follow them into the hands of third parties.

Whether the contract amounts to a bargain and sale or merely to an agreement to sell depends on the intention of the parties as expressed by their agreement, but as the parties frequently do not express their intention, or do not do so clearly, certain rules have been laid down by which the intention of the parties may be ascertained. These are contained in sections 20 to 22, 24 and 25 of the Act.

It is obvious that where goods are not specific and ascertained at the time of the making of the contract, the contract can only be an agreement to sell. For “till the parties are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description, and since the seller would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the buyer could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any

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particular lot of goods more than another, till it is ascertained which are the very goods sold" (t).

Subject again to the expressed intention of the parties, the rules for determining when "it is ascertained which are the very goods sold," so that the property in them passes to the buyer (and then the rights and liabilities of the seller and buyer will be the same as if the contract had originally been a bargain and sale), or to use the phraseology of subsection (4), when "an agreement to sell becomes a sale," are laid down in sections 23 and 25 of the Act.

History of the law.—The law on this point has gone through several stages. The rule of early Germanic law, followed in England till the fifteenth or late fourteenth century, was that nothing short of actual delivery would pass property, whether the transaction were gift, barter, or sale (u). But in the fourteenth century it was established that a buyer who had given security by deed for payment of the price acquired the right to immediate possession, a right which he might enforce either by action, or by taking the goods peaceably if he could; and in the fifteenth century this was extended to the case of an informal bargain (v). As the immediate right to possess a thing was constantly spoken of as "property," it is not difficult to understand how the rule that a contract itself passes the property came to be accepted. Down to the early part of the seventeenth century it was thought that an agreement to give credit must be express; but, as Lord Blackburn wrote before the middle of the nineteenth century, "in modern times (at least in commercial transactions) the parties are taken to contemplate an immediate transfer of the property in the goods, and an immediate obligation to pay the price with a reasonable time for delivery and payment, unless there is something to show a different intention" (w). This is the rule in the only shape which now has to be considered for any practical purpose (x). A similar rule, notwithstanding that the Roman law is otherwise, has been adopted for not only moveable but immoveable property in France and in those jurisdictions (including among British possessions, the Province of Quebec and Mauritius) where the modern French codes have been

(t) Blackburn on Sale, p. 125.

(u) Bracton, fo. 61 b.

(v) Ames in Harv. Law Rev., VIII, 259; repr. Essays in Anglo-American Legal History, iii., 312. Thus the truth lies between Serjeant Manning, who suggested that the common law rule was due to comparatively recent misunderstanding, and Lord Blackburn, who proved against Manning that it was recognized in the fifteenth century, and inferred that it had "existed since English law begun;" Blackburn on Sale, 261 *et seq.* The treatment of this point

in *Cochrane v. Moore* (1890) 25 Q.B. Div. 57, at p. 71, C.A. where the question before the Court was of the effect of a gift without delivery, is not adequate.

(w) Blackburn on Sale, ed. Graham, p. 172 (p. 149 of original edition). As to the questions raised in the common law by a gift of chattels without delivery, which are outside the present undertaking and by no means free from difficulty, see Pollock, Essays in the Law, London, 1922, p. 141.

(x) See section 5.

introduced or imitated. Contracts for the sale of immoveable property, however, are guarded by requirements of form (y). S. 4

The following observations of Parke, B., are classical, though now elementary, and may be quoted here, though they somewhat anticipate the sections of the Act dealing with the transfer of property :

" I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey v. Culverwell* (z) in a note by the reporters ; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained : but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee " (a).

Quasi-contracts of sale.—There are certain transactions which have the effect of passing the property in goods, though they are not contracts. Thus where a plaintiff sues for the conversion of the goods and recovers their value (as he could do either in an action of trespass *de bonis asportatis* or trover) and the judgment is satisfied, the property in the goods vests in the defendant (b). The result of this is that, if the conversion complained of is a wrongful sale by the defendant to a third party, the purchaser from the defendant obtains an absolute title to the goods, when the defendant satisfies the judgment. As between himself and his seller he has a title by estoppel and the general principle of law is that when the interest accrues it feeds the estoppel, and his seller, by satisfying the judgment, having become entitled to the goods, the sub-purchaser has the advantage of that and acquires an indefeasible title

(y) Hence particular rules as to specific performance are not needed in modern French law, for the purchaser has by force of the contract itself all the rights and remedies of an owner. This has been overlooked by one or two learned English writers.

(z) 2 Man. & Ry. 566 (by Serjeant Manning); see Com. Dig. Biens, D. 3. (See note (v) on page 32.)

(a) *Dixon v. Yates* (1833) 5 B. & Ad., 313, 340, 39 R. R., at pp. 497, 498, cited by Willes, J., in *Godts v. Rose* (1855) 17 C. B. 229, 104 R. R. 668.

(b) *Cooper v. Shepherd* (1846) 3 C. B. 266, 71 R. R. 349; *Erinsmead v. Harrison* (1871) L. R. 6 C. P. 584; *Holmes v. Wilson* (1839) 10 A. & E. 503, note at p. 511, 50 R. R. 492.

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against the whole world. And if the true owner seeks to recover the goods themselves in a suit under the Specific Relief Act, 1877 and the Court, instead of ordering the return of the goods, awards their value as compensation, and the compensation is paid, the property will vest in the defendant. The same result may follow in England when the plaintiff sues to recover the goods in an action of detinue; for in England, as in India, the power of the Court to order the return of the goods is discretionary, and usually when the goods are articles of commerce and readily obtainable in the market, compensation in damages is regarded as an adequate remedy (c).

In all the above cases, however, it is necessary that the judgment should be satisfied, for until it is satisfied the property remains in the plaintiff (d).

Waiver of tort.—It is open, moreover, to the true owner to waive the tort if he wishes. So if a person buys goods from one who has no right to sell them, the true owner may treat the transaction as a sale by himself to the person who has obtained the goods and recover the price from him (e); and as against the person who wrongfully sold the goods he may recover the proceeds of the sale in an action for money had and received (f).

An election of this kind, however, when once made is final. If, therefore, the owner brings an action for the price or the proceeds of the sale and recovers judgment he cannot afterwards, even though the judgment remains wholly unsatisfied, treat the transaction as tortious and sue for damages for conversion or for the recovery of the goods (g); for by his own act he has admitted the lawfulness of the sale. Occasionally,

(c) *Whiteley v. Hilt* (1918) 2 K. B. 808, at pp. 819, 829, C. A.; *Cohen v. Roche* (1927) 1 K. B. 169, at pp. 179-181. See too *ex parte Drake* (1877) 5 Ch. Div. 866, at p. 871, C. A. At common law, owing to defective procedure, a defendant in an action of detinue could always satisfy the judgment by paying the appraised value of the goods and could not be compelled to return them. See *Eberles Hotels Co. v. Jonas* (1887) 18 Q. B. D. 459, at p. 468, C. A. and cf. *Pollock and Mulla*, p. 662. The result was that a court of equity alone could enforce the return of a specific chattel, and it would not do so if damages provided an adequate remedy. Hence the rule as to the discretion of the Court, preserved in s. II (b) of the Specific Relief Act, 1877. See further s. 58 and notes thereto.

(d) *Brinsmead v. Harrison* (1871) L. R.

6 C. P. 584; *ex parte Drake*, *supra*; *Ellis v. John Stenning & Son* (1932) 2 Ch. 81.

(e) See *Dickenson v. Naul* (1833) 4 B. & Ad. 638; *Allan v. Hopkins* (1844) 13 M. & W. 94; cf. *Hill v. Ferrott* (1810) 3 Taunt. 274.

(f) *Arnold v. Cheque Bank* (1876) 1 C. P. D. 578, at p. 585; *Attorney General v. De Keyser's Hotel* (1920) A. C. 508, at p. 556.

(g) *Smith v. Baker* (1873) L. R. 8 C. P. 350; *Verschures Creameries v. Hull & Netherlands S. S. Co.* (1921) 2 K. B. 608, C. A.; cf. *Bradley v. Ramsay & Co.* (1912) 106 L. T. 771, C. A., where the Court held that the judgment was in substance a judgment by consent for the price of the goods, and consequently the property passed though the judgment remained unsatisfied, and in form the action was an action of detinue.

however, his act may be ambiguous, and it will then be a question of fact whether it amounts to an election or not (h).

Formalities of the Contract.

5. (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.

Contract of sale
how made.

(2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

Formation of the contract of sale.—This section scarcely requires comment.

Sub-section (1) emphasizes the consensual nature of a contract of sale and consequently the parties may agree to such terms as they think fit. The different legal consequences which follow from a contract of sale according as it is a contract for the sale of goods on credit or not, a contract for the delivery of goods by instalments and the like, are dealt with under the appropriate sections.

The real importance of sub-section (2) lies in the fact that it makes it clear that in India the provisions of section 4 of the English Act, which reproduces with certain variations section 17 of the Statute of Frauds, have no application.

For practical purposes, therefore, it may be said that in India a contract for the sale of goods may be in any form which shows that the parties were agreed, unless one of the contracting parties is a corporation. In such cases the contract may have to be under the seal of the corporation (i).

If the contract be in fact reduced into writing, it is, like other contracts in writing, governed by the rules of evidence laid down by sections 65-66, and sections 91-92 of the Indian Evidence Act, 1872 (j).

(h) *Smith v. Baker*, *supra*, at pp. 355-6; *Ries v. Beed* (1900) 1 Q. B. 54, C. A.

(i) As to this see Pollock & Mulla, pp. 350-355.

(j) As to contracts partly printed and

partly written, see *Op. Cit.*, p. 60. As to falsification of a written contract contained, *c.g.*, in bought and sold notes, see *Durga Prosad Sureka v. Bhajan Lall Lokea* (1904) 31 Cal. 614, L. R. 31 Ind. Ap. 122.

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The context makes it clear that "implied" in this section is used in the sense in which it is used in section 9 of the Indian Contract Act (*k*). Terms which are implied by law in a contract of sale are dealt with in later sections.

Earnest.—The conclusion of a contract of sale is sometimes marked by the giving of earnest and this was expressly referred to in section 78 of the Indian Contract Act.

With regard to the giving of earnest, attention may be called to the learned judgment of Sir Edward Fry, then a Lord Justice of Appeal, in *Howe v. Smith* (l). He says :—

"The practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring (*m*) or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity and very general prevalence . . . It was familiar to the law of Rome (where the rule was that a defaulting buyer forfeited the earnest-money, and a defaulting seller was bound to restore it two-fold) . . . That earnest and part payment are two distinct things, is apparent from the 17th section of the Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a parol contract" (*n*).

There is, however, nothing to prevent the same payment from being both earnest and part payment if such is the intention ; and this is, in fact, under the conditions in common use in England, the character of the deposit on a sale of land. "The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business" (*o*).

Earnest, whether given in money or not, must be something of value really given by the buyer and kept by the seller ; a mere symbolic ceremony such as one party drawing a coin across the other's hand will not do (*p*). This seems, indeed, plain enough without authority.

When a deposit in the nature of earnest is paid on a contract for the sale of immoveable property in India, a vendor by whose default the

(*k*) Op. Cit., pp. 57-58.

(*l*) (1884) 27 Ch. Div. 89, 101 ; cf. *Farr Smith & Co. v. Messers, Ltd.* (1928) 1 K. B. 397, 408-409.

(*m*) The European wedding ring was originally given as a pledge on betrothal, *arrurum nomine datus* in mediæval Latin. The modern engagement ring thus represents the more ancient custom. The Latin word *arrha* is represented by the old Northern English *arles*, of which earnest may be a variant form, but this is uncertain. See the words in the

Oxford English Dictionary.

(*n*) The distinction between part payment and earnest is preserved in s. 4 (1) of the Sale of Goods Act, 1893, which has superseded the 17th section of the Statute of Frauds.

(*o*) Lord Macnaghten in *Soper v. Arnold* (1889) 14 App. Cas. 429, 435 ; *Khurai Municipality v. Kauram Hiralal* (1943) Nag. 740, ('44) A. N. 73.

(*p*) *Blenkinsop v. Clayton* (1817) 7 Taunt. 597, 18 R. R. 602.

sale goes off must return the sum so paid (q), but if the default is the purchaser's the purchaser must lose it (r). Section 74 of the Indian Contract Act does not apply to such a deposit, and a stipulation for its forfeiture in case of breach is not one by way of penalty (s). But if on breach of the agreement by the purchaser the vendor resells the property, and sues to recover the loss arising on such resale, the deposit, although forfeited, is to be taken into account as diminishing the deficiency (t). See Pollock and Mulla, pp. 683-684. The rule is no doubt the same for goods (u). Where a part payment for the goods is made by the buyer, on the contract falling through by reason of the buyer's default, the buyer is entitled to recover the purchase price that he has paid, subject to the right of the seller to set off damages against that claim (v).

See
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Subject-matter of Contract^A

6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

(q) *Ibrahimkhori v. Fletcher* (1896) 21 Bom. 827, 853; *Alokeshi Dassi v. Hara Chand Dass* (1897) 24 Cal. 897.

(r) *Bishan Chand v. Radha Kishan Das* (1897) 19 All. 489; *Roshan Lal v. The Delhi Cloth, etc., Co. Ltd.* (1910) 33 All. 166, 7 I. C. 794; also *Natesa Aiyar v. Appavu* (1913) 38 Mad. 178, 19 I. C. 462; *Atul Chandra Kundu v. Sarat Chandra Laha* (1919) 24 C. W. N. 967, 59 I. C. 215. See also *Municipal Board of Allahabad v. Tikandar Jang* (1915) 38 All. 52, 30 I. C. 584, which turned upon the construction of the conditions of sale: *Lala Gopal Das v. Pandit Ratan Lal* (1929) 5 Luck. 49, 117 I. C. 473, ('29) A. O. 254 (sale of a decree).

(s) *Natesa Aiyar v. Appavu* (1913) 38 Mad. 178, 19 I. C. 462; *Veerayya v. Sivayya* (1914) 27 Mad. L. J. 482, 26 I. C. 121. See, however, *Bhimji Dalal v. Bombay Trust Corporation* (1929) 54 Bom. 381, 124 I. C. 800, ('30) A. B. 306.

(t) *Ockenden v. Henly* (1858) E. B. & E. 485, 113 R. R. 740; *Shuttleworth v.*

Clews (1910) 1 Ch. 176; *Vellore Taluk Board v. Gopalasami* (1913) 38 Mad. 801, 26 I. C. 226.

(u) *Muhammad Habib-Ullah v. Muhammad Shafi* (1919) 41 All. 324, 50 I. C. 948. See *Piari Lal v. Mina Mal* (1927) 50 All. 82, 102 I. C. 766, ('27) A. A. 621 (buyer recovering deposit); *Subba Ayyar v. Munisami Ayyar* (1927) 50 Mad. 161, 98 I. C. 516, ('26) A. M. 1133 (forfeiture of deposit); *Gowal Das Sidany v. Luchmi Chand Jhawar* (1930) 57 Cal. 106, 125 I. C. 594, ('30) A. C. 324 (forfeiture of deposit).

(v) *Satyanarayanamurthi v. Erikalappa* (1926) 50 Mad. L. J. 150, 92 I. C. 962, ('26) A. M. 410; *Desu Rattama v. Kakarapurthi Krishna Murthi* (1928) 54 Mad. L. J. 40, 106 I. C. 482, ('28) A. M. 326; *Muralidhar Chatterjee v. International Film Co. Ltd.* (1943) 70 I. A. 35, ('43) A. PC. 34, (1943) 2 M. L. J. 369. See *Dies v. British & International Mining and Finance Corporation* (1939) 1 K. B. 724.

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Example.—The section may be illustrated by the following example :

A agrees to supply *B* with a quantity of turnip seed which *B* agrees to sow on his own land and sell the crop therefrom to *A* at a given price per bushel. This is an agreement for the sale of goods (*w*).

Future goods.—Sub-section (1) does not require any comment or explanation, while sub-section (2) is merely a particular instance of the sale of future goods, and perhaps it would have been thought needless to enact it specifically but for the fact that in the case of *Hibblewhite v. McMorine* (*x*), an attempt was made to maintain the contrary on the authority of a ruling of Lord Tenterden at *nisi prius* (*y*) founded on some ground of supposed public policy, but as Alderson, B., observed, if such a ruling were followed “it would put an end to half the contracts made in the course of trade.” Shortly afterwards the decision was approved and followed in a case involving other points also (*z*). No one has thrown any doubt on it since.

Ready goods.—Parties may contract if they please for goods to be selected by the seller from a stock in his actual possession at the date of the contract, but any such intention must be clearly expressed; the words “ready goods” do not bear that meaning in the Calcutta market (*a*).

Failure of the contingency.—If the contingent event does not happen, the result must depend upon the agreement of the parties. The seller may contract absolutely to supply the goods, despite the uncertainty of his being able to acquire them, and in such a case he will be liable to pay damages if he fails to perform his contract (*b*); or the buyer may have to pay in any event, for “a man may buy the chance of obtaining goods” (*c*), and “if a man should be foolish enough to make a purchase of a chance, he must perhaps abide by the consequence of his rashness” (*d*); or the contract may be made conditional on the happening of the contingency, and if the condition is not fulfilled both parties will be discharged from their obligations, as in cases of a sale of goods “to

(*w*) *Watts v. Friend* (1830) 10 B. & C. 446, 34 R. R. 477.

(*x*) (1839) 5 M. & W. 462.

(*y*) *Bryan v. Lewis* (1826) Ry. & Moo. 386.

(*z*) *Mortimer v. McCallan* (1840) 6 M. & W. 58, 55 R. R. 503, 513, 517, 518; cf. *Ajello v. Worsley* (1898) 1 Ch. 274.

(*a*) *Mulchand Chandolia v. Kundan-mall* (1919) 47 Cal. 458, 57 I. C. 140. The true meaning, it seems, is that the seller is in a position to deliver goods answering the description.

(*b*) *Simond v. Braddon* (1857) 2 C. B.

(N. S.) 324, 109 R. R. 697; *Hale v. Rawson* (1858) 4 C. B. (N. S.) 85, 114 R. R. 632; *Ganesh Das-Ishar Das v. Ram Nath* (1928) 9 Lah. 148, 111 I. C. 498, (28) A. L. 20.

(*c*) *Buddle v. Green* (1857) 27 L. J. Ex. 33, at p. 34, 114 R. R. 991, per Martin, B.

(*d*) *Hitchcock v. Giddings* (1817) 4 Price 135, 18 R. R. 725, per Richards, C. B.; cf. *Hanks v. Polling* (1856) 6 E. & B. 659, at p. 669, 106 R. R. 752; *Covas v. Bingham* (1853) 2 E. & B. 836, 95 R. R. 842.

arrive" (e). Sometimes such a condition will be implied (f); and such cases really form part of the law relating to impossibility of performance (g).

Wagering contracts.—A pretended contract under this sub-section may be merely a colourable device for gambling in the rise and fall of prices, and will therefore be void under section 30 of the Indian Contract Act (h). It takes two to make a gambling contract, however, and therefore if one party intends to make a valid contract and to deliver or accept the goods, as the case may be, at the agreed time, it will not be a void contract, even though to his knowledge the other party may have entered into it as a pure speculation without any prospect of being able to pay for or deliver the goods should the speculation turn out unfavourably. "If the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one, or not, and those intentions are at variance, those of one party being such as, if agreed in by the other, would make the contract a wagering one, whilst those of the other would prevent it from becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable by law as an ordinary one" (i). Still less is it a wagering contract when both parties intend to deliver and accept the goods, whether at a price fixed by the contract, or at a price dependent on the market price on the date of the delivery of the goods, though each is aware that he may suffer a severe loss or reap a large profit, according as prices may rise or fall between the date of the making of the contract and the date fixed for its completion (j). But "in construing a contract with a view to determining whether it is a wagering one or not, the Court will receive evidence in order to arrive at the substance of it, and will not confine its attention to the mere words in which it is expressed, for a wagering contract may be sometimes concealed under the guise of language which, on the face of it, if words were only to be considered, might constitute a legally enforceable contract" (k). The essence of a wagering contract is that one of the parties will win, and the other lose, on the happening of an uncertain event, in which neither has any interest, except that arising from the possibility of

(e) See the cases collected in Benjamin on Sale, p. 608 *et seq.*

(f) *Howell v. Coupland* (1876) 1 Q.B.D. 258, C.A.

(g) Indian Contract Act, s. 56, Pollock & Mulla, pp. 306-316.

(h) Pollock & Mulla, pp. 215-234, where the whole subject is fully discussed.

(i) Per Hawkins, J., *Carlill v. Carbolic Smoke Ball Co.* (1892) 2 Q.B. 484, at p. 491; *Ironmonger v. Dyne* (1928) 44 T. L. R. 497, C. A.; *Thacker v. Hardy*

(1878) 4 Q.B.D. 685, C.A.; *Forget v. Ostigny* (1895) A. C. 318, P. C.; *Weddle Beck & Co. v. Hockett* (1929) 1 K. B. 321; *Kanwar Bhan Sukha Nand v. Ganpat Rai Ram Jivan* (1926) 7 Lah. 442, 94 I. C. 304, ('26) A. L. 318.

(j) *Barnett v. Sanker* (1925) 41 T. L. R. 660.

(k) *Carlill v. Carbolic Smoke Ball Co.* (1892) 2 Q.B. at pp. 491-492. See *Grizewood v. Blane* (1851) 11 C. B. 526; *Universal Stock Exchange v. Strachan* (1896) A. C. 166.

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such gain or loss, and nothing is to be done in performance of the contract by either party except to pay the loss which constitutes the gain of the other, and consequently no delivery or acceptance of any goods thereunder is contemplated by either party (l).

Future products of existing property.—Sub-section (3) lays down a rule which in English authorities is a wide rule in the law of property —“ it is a common learning in the law, that a man cannot grant or charge that which he hath not ” (m). But future products of existing property could at common law be granted ; of such things the grantor is said to have a potential possession. “ He that hath (the land) may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant ” (n). But the produce must be of existing property. “ A man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter ” (o).

This rule cannot be said to have ceased, by reason of the provisions of the Act, to be of any moment. Its practical importance lies in the fact that the property in the future product will pass to the buyer, as and when it is identified by coming into existence, without any further act of appropriation and without the necessity of invoking equity to give to the buyer rights to the goods, which it sometimes finds itself unable to do (p), and refuses to do as against a legal title acquired for value and in good faith (q). Although, therefore, the grant of the future product of existing property may, by virtue of the wording of the sub-section, be no more than an agreement to sell (r), it will, in the absence of any provision to the contrary in the contract, pass into a sale when the subject-matter of the contract comes into existence (s).

(l) *Sukdevdoss Ramprasad v. Govindoss Chaturbhujadoss & Co.* (1927) 55 I. A. 32, 36 ; 51 Mad. 96, 107 I. C. 29, ('28) A. PC. 30 (a case of patta patti transaction in Madras).

(m) Perkins, Profitable Book, (1657) Grants pl: 65, per Cur.; *Lunn v. Thornton* (1845) 1 C. B. 379, 386, 68 R. R. 727.

(n) *Grantham v. Hawley* (1615) Hob. 132 ; *Waddington v. Bristow* (1801) 2 B. & P. 452 ; *Petch v. Tutin* (1846) 15 M. & W. 110.

(o) *Grantham v. Hawley*, *supra*. This does not mean that he cannot make a binding contract to sell and deliver the wool when he has it, but that such a contract will create only personal rights, and not a right *in rem*, to the wool promised. See Chalmers, pp. 29-30.

(p) *In re Wait* (1927) 1 Ch. 606, C.A.

(q) *Hoare v. Dresser* (1859) 7 H. L. C. 290, 115 R. R. 154.

(r) Even this is not quite certain, for it is arguable that such a product is not “ to be manufactured or produced or acquired by the seller ” and the sale of such a product may therefore come within the saving of s. 66 (e) as not being dealt with specifically by the Act.

(s) The case of *Langton v. Higgins* (1859) 4 H. & N. 402, 118 R. R. 515, does not, it is submitted, militate against this view. In that case, there was an assignment of all future crops of oil of peppermint as security for an advance by the buyer ; and the buyer was in the habit of sending bottles to be filled with the oil. It could therefore be inferred that the intention of the parties was that the property in the oil should not pass until put into the bottles. Moreover, the oil had to be extracted from the crop by artificial means.

The rule extends only to natural produce, and not to after-acquired stock in trade or the like; accordingly a bill of sale purporting to comprise all the goods "now remaining and being, or which shall at any time hereafter remain or be" in or about the grantor's house at Z does not of itself pass property in after-acquired goods, and can be made to apply to them only by some specific act appropriating them to the grant (t). It may be doubted, too, whether it applies to such things as are produced by labour from potentially existing property, as butter or cheese to be made from the future milk of a herd of cows; and perhaps in such cases the natural inference is that the parties do not intend the property to pass without some further act of appropriation (u).

Equitable assignments.—At equity it is equally impossible to effect a present sale of future goods, but when the goods are sufficiently identified the beneficial interest thereto will pass to the assignee and his rights will be protected and enforced by equitable remedies (v).

The rules of this section do not apply to such assignments, whether by way of security or otherwise, and, in as much as such an assignment does not at any time transfer ownership, but only a right on the part of the assignee to obtain the benefit of the right which has been assigned to him by the assignor, the subject is not properly before us here, and it will suffice to refer to a few passages of Lord Macnaghten's judgment in the leading case of *Tailby v. Official Receiver* (w). "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified. . . . The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done, if that principle is applicable under the circumstances of the case."

(t) *Lunn v. Thornton* (1845) 1 C. B. 379, 68 R. R. 727; cf. *Robinson v. Macdonnell* (1816) 5 M. & S. 228.

(u) A; to this see section 23 post.

(v) *Holroyd v. Marshall* (1861) 10 H. L. C. 191, 138 R. R. 108; *Collyer v. Isaacs* (1881) 19 Ch. Div. 342, C. A.; *Joseph v.*

Lyons (1884) 15 Q. B. D. 280, C. A. See also *In re Wait* (1927) 1 Ch. 606, C. A., where the question of equitable assignments was fully discussed.

(w) (1883) 13 App. Cas. 523, at pp. 543, 547. See also *Brandt's Sons & Co. v. Dunlop Rubber Co.* (1905) A. C. 454,

Such applications of the equitable principle are liable to be complicated by the existence of imperative statutory rules as to particular kinds of transactions or dealings with particular kinds of property, as in England the Bills of Sale Acts, and care must be taken not to assume too hastily that the general principle will have its normal operation in any given state of facts.

The general equitable principle in question has been recognized and applied by Indian Courts. Thus, where *A* at Virangam consigned goods to *B* at Bombay for sale on commission, and drew hundis against the goods which *B* accepted and paid, and it was arranged that *B* should pay himself the advances out of the sale proceeds of the goods when he received and sold them, it was held that the agreement constituted a good equitable charge upon the goods, and that they could not therefore be attached by persons holding decrees against *A*, even though the goods had not yet come into the possession of *B* (*x*). There is a similar case in the High Court of Madras, where money was advanced by *A* to *B* to cut and prepare timber in a forest, and *A* was to pay himself the advances out of the sale proceeds of the goods when he received and sold them (*y*).

7. Where there is a contract for the sale of specific goods, the contract is void if the goods ^{Goods perishing before making of contract.} without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

Examples.—The section may be illustrated by the following examples:—

(1) Sale of a cargo of corn. Unknown to the seller the cargo had before the sale become heated and in consequence had been landed at an intermediate port and sold by the master of the ship. The first-mentioned sale is void (*z*).

(2) Sale of 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive by a certain ship, at a stated price per cwt. from the quay. Unknown to the seller the goods had, before the contract was made, when lying at the port of loading, been destroyed by flood following an earthquake. The sale is void (*a*).

(*x*) *Velji Hirji & Co. v. Bharmal* (1896) 21 Bom. 287; *Palaniappa v. Lakshmanan* (1893) 16 Mad. 429; *Baldeo Parshad v. Miller* (1904) 31 Cal. 667 (mortgage of indigo cakes to be manufactured hereafter).

(*y*) *Maradugula v. Kotala* (1911) 21 Mad. L. J. 413, 9 I. C. 255.

(*z*) *Couturier v. Hastie* (1856) 5 H. L. C. 673, 101 R. R. 329.

(*a*) *Smith v. Myers* (1871) L. R. 7 Q. B. 139, Ex. Ch.

(3) Sale of 700 bags of nuts, identified by marks, lying in a named warehouse. Unknown to the seller, before the sale 109 of the bags had been stolen. The sale is void and the buyer cannot be compelled to take the remainder (b).

Non-existence of the subject-matter of the contract.—This section, it will be observed, applies both to sales and to agreements to sell. It corresponds to section 6 of the English Act and is declaratory of the common law. "The rule has been established for many years that where a contract relates to specific goods which did not then exist, the case is not to be treated as one in which the seller warrants the existence of those specific goods, but as one in which there has been a failure of consideration and mistake" (c).

The English Act does not contain the words "or become so damaged as no longer to answer to their description in the contract." The addition of these words removes any doubt as to whether the section applies to such a case, though probably even without them it would be held to do so, for as Lord Ellenborough characteristically put it in a case relating to insurance, "it surely cannot be less a total loss because the commodity subsists in specie, if it subsists only in the form of a nuisance" (d).

From the state of the authorities in England, indeed, it may be said that the section will apply not only to cases where the goods have been destroyed or have been so damaged as no longer to answer to their description, but also to cases where the seller is irretrievably deprived of them, as when they have been stolen or lawfully requisitioned by the Government or have, in some other way, been lost and cannot be traced (e).

Non-existence of part of the goods sold.—The section would also apply where two or more specific things are sold for an entire price or otherwise under an entire contract and one or more of them has or

(b) *Barrow Lane & Ballard, Ltd. v. Phillips & Co., Ltd.* (1929) 1 K. B. 574.

(c) *Ib.* at p. 582, per Wright, J.

(d) *Cologan v. London Assurance Co.* (1816) 5 M. & S. 447, 455, 17 R. R. 390. There is no reason to suppose that the decision in *Couturier v. Hastie, supra*, example (1), would have been different if the master had not actually sold the wheat. The same rule applies in cases relating to contracts of affreightment; *Asfar v. Blundell* (1896) 1 Q. B. 123, C. A. (dates contaminated with sewage so as to be unsaleable as dates, though

they could be used for making spirits); *Duthie v. Hilton* (1868) L. R. 4 C. P. 138 (cement through being wetted turned into a solid block and so losing its character as cement).

(e) *Barrow Lane & Ballard v. Phillips, supra*; *Skipton Anderson & Co. v. Harrison* (1915) 3 K. B. 676, 682. Compare the Marine Insurance Act, 1906, s. 57. "Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss."

have perished at the date of the contract (*f*). Thus in the case of *Barrow Lane & Ballard v. Phillips* (*g*) the buyer who had given bills in payment of the price of the whole 700 bags was held entitled to repudiate the whole contract and could not be made liable on the bills or be compelled to accept what was left of the bags. From this it follows that the seller could not be compelled to deliver what was left, and equally the buyer if he had actually paid the whole or part of the purchase price could recover it, as on a total failure of consideration: unless indeed he had actually received and used part of the goods. For these he would have to pay at the contract rate (*h*). This is but reasonable, for if the buyer were compelled to accept or the seller to deliver what was left of goods bought and sold under an entire contract, the Court would in effect be substituting the contract made by itself for the one made by the parties.

Knowledge of the parties.—The knowledge of the seller is the important consideration, for the contract is void if the goods have perished without his knowledge. It does not therefore matter what was the knowledge of the buyer—not that it is likely that any one would agree to buy goods which he knew to have perished. On the other hand if the seller, knowing the goods to have perished, agreed to sell them, he would be liable in damages if the buyer did not know of this fact, as in other cases where a person promises for valuable consideration to do something which he knows he cannot perform (*i*). In the highly improbable event of both knowing that the goods had perished the contract would, on general principles, be void (*j*).

Sale of part of an identified stock.—The section does not apply to a contract of sale of generic goods: but it has been suggested that it applies to the case where there is a sale of part of an identified stock as “50 cases of tea out of a 100 cases now in a certain warehouse,” and at the time of the contract that stock had perished (*k*). This involves giving the words “specific goods” a meaning different from that given in the definition; and certainly an agreement to sell goods forming part of an existing stock is not generally regarded as the sale of specific

(*f*) Benjamin on Sale, p. 153, quoted with approval and applied by Wright, J., in *Barrow Lane & Ballard v. Phillips*, *supra*. This was also the rule in the civil law. *Si duos quis servos emerit pariter uno pretio, quorum alter ante venditionem mortuus est, neque in vivo constat emptio.* Dig. 18, 1, 44.

(*g*) *Supra*, example (3).

(*h*) This happened in *Barrow Lane & Ballard v. Phillips*, *supra*, the buyer having received some of the 591 sacks

which were left: but no question arose as to these. In effect this amounted to a new contract to be inferred from the actual delivery and acceptance of the goods. Cf. s. 37 (1).

(*i*) *Bell v. Lever Bros., Ltd.* (1932) A. C. 181, 217, per Lord Atkin.

(*j*) Indian Contract Act, s. 56; Pollock & Mulla, p. 305 *et seq.*

(*k*) Chalmers, p. 31, approved by Wright, J., *obiter* in *Barrow Lane, etc. v. Phillips*, *supra*.

goods (l). Perhaps, therefore, it would be more in accordance with proper rules of construction to say that such a case would fall within the general principles of section 20 or section 56 of the Indian Contract Act and to confine the operation of this section to a contract for the sale of specific goods as defined by the Act (m).

Usage.—The provisions of this section may be negated by express agreement or by usage of a particular trade. The seller, for instance, may be entitled by custom to appropriate goods to the contract and the buyer may be bound to accept such appropriation although the goods were lost when it was made (n). This section has no application to a c.i.f. contract when goods answering to the description have been put on board (o).

8. Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

Goods perishing
before sale but after
agreement to sell.

Examples.—The section may be illustrated by the following examples :—

(1) Contract for the sale of a horse on the condition that the buyer should have it for eight days for trial and be at liberty to return it at the expiration of that period if he did not find it suitable. The horse dies without any fault on the part of either party three days after it had been delivered to the buyer for trial. The contract is avoided (p).

(2) Contract for the sale of a specific parcel of wheat lying in a warehouse, payment to be made within seven days against transfer order, the wheat to remain the property of the seller in the meantime. Before the expiration of the seven days the wheat is lawfully requisitioned by the Government. The contract is avoided (q).

(3) B agrees with A to buy a horse from him for a stated sum and to fetch and take it away on a day named, the bargain being for ready

(l) See section 18. The goods are "specifically described" rather than specific. See further the notes to the following section.

(m) See Pollock & Mulla, p. 307. It would be a case where "a specific subject-matter is assumed by the parties to exist" and is "accidentally destroyed" within the principle of *Taylor v. Caldwell* (1863) 3 B. & S. 828, 129 R. R. 573; *Howell v. Coupland* (1876) 1 Q. B. D.

258, C. A.; *Kimjilal Monohardas v. Durgaprasad Debiprasad* (1919-20) 24 C. W. N. 703, 58 I. C. 761.

(n) *Produce Brokers Co. v. Olympia Oil & Cake Co.* (1917) 1 K. B. 320, C. A.

(o) As to the c.i.f. contract, see notes to s. 39.

(p) *Elphick v. Barnes* (1880) 5 C. P. D. 321.

(q) *In re Shipton Anderson & Co. & Harrison Bros.* (1915) 3 K. B. 676.

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money. Shortly before the day named *B* comes back, rides the horse and asks *A* as a favour to keep him for another week, saying that at the end of the week he will call and pay for it. Before the end of the week the horse dies. The contract is avoided and *A* must bear the loss, for there has been no delivery to *B* and no transfer of ownership (*r*).

Goods perishing after the contract is made.—This section reproduces section 7 of the English Act with the addition of the words “or become so damaged as no longer to answer their description in the agreement” (*s*) and, unlike the previous section, deals with a case where the goods are in existence at the time of making the contract, but perish without the fault of either party before the risk has passed to the buyer (*t*). From the nature of the case, therefore, this section is confined to agreements for sale and cannot apply to executed contracts of sale.

Under this section the contract is not void *ab initio* as under the previous section, but avoided by the perishing of the goods, and rights vested before that event will not be affected; so that if, for example, there be a day fixed by the contract for the payment of the price, irrespective of delivery, and the goods do not perish until after that day, the seller may recover it or retain it if already paid (*u*). Otherwise all obligations under the contract are dissolved, and, at any rate if the section is confined to the case of an agreement to sell specific goods within the meaning of the definition, it is apprehended that the same results will follow from the avoidance of the contract as follow under section 7. If, therefore, the contract be for the sale of two or more things under an entire contract, the perishing of some of them would avoid the whole contract; and “perish” will have the same meaning as in the previous section.

The basis of the section is that the perishing is not due to the wrongful act or default of either party; if either party is to blame for the loss or destruction of the goods, he will be liable for their non-delivery or will have to pay the price, as the case may be, and this section must be read subject to section 31, as well as section 26.

Specific goods.—It has been suggested that in this section also “specific goods” has a wider meaning than that given in the definition and may be extended so as to include unascertained goods which form a part of a specific subject-matter, whether existing at the time that the contract is made or to come into existence thereafter (*v*); and this suggestion

(*r*) *Tempest v. Fitzgerald* (1820) 3 B. & Ald. 680, 22 R. R. 526.

(*s*) See note to section 7.

(*t*) See section 26.

(*u*) Cf. section 55 (2).

(*v*) Chalmers, p. 31.

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is supported by the language used by the learned Judges in the case of *Howell v. Coupland* (w). In that case the defendant in March agreed to sell to the plaintiff 200 tons of regent potatoes of a specified size, grown on land belonging to the defendant at a named place, at £3 10s. per ton, to be delivered in September and October and paid for as taken away. At that time the defendant had some 68 acres ready for potatoes which were afterwards sown and were fully sufficient to grow more than 200 tons in an ordinary season; but, without any fault on the part of the defendant, in August the crop was attacked by the potato disease and the defendant could only deliver about 80 tons. In an action by the buyer for breach of contract it was held, in these circumstances, that the defendant was not liable for failure to deliver the remainder. Blackburn, J., described the contract as a contract for the delivery at a future time of "a specific thing, so far as this, that it is for the delivery of a portion of a specific thing. It is just like the case of a contract for the purchase of 10 or 100 tons of a cargo of goods out of a particular ship to arrive, which must be so many tons out of the bulk on board the ship named.....The principle of *Taylor v. Caldwell* (x), which was followed in *Appleby v. Myers* (y) in the Exchequer Chamber, at all events, decides that where there is a contract with respect to a particular thing, and that thing cannot be delivered owing to it perishing without any default in the seller, the delivery is excused. Of course, if the perishing were owing to any default of the seller, that would be quite another thing.....Had the contract been simply for so many tons of potatoes of a particular quality, then, although each party might have had in his mind when he made the contract this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for; for it would not have been within the rule of a contract as to a specific thing (z). But the contract was for 200 tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished" (a).

And Mellish, L. J., in the Court of Appeal said, "This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold; here there was an agreement to sell and buy 200 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things. Therefore neither party is liable if the performance becomes impossible" (b).

(w) (1874) L. R. 9 Q. B. 462; (1876) 1 Q. B. D. 258, C. A.

(x) (1863) 3 B. & S. 826, 129 R. R. 573.

(y) (1867) L. R. 2 C. P. 651.

(z) Cf. *Re Thornett & Fehr and Yuille* (1921) 1 K. B. 219; *Hayward Brothers v. Daniel* (1904) 91 L. T. 319.

(a) L. R. 9 Q. B. at pp. 465-466.

(b) 1 Q. B. D., p. 262.

It may well be that the section in the English Act to which this section corresponds was based upon *Howell v. Coupland*, and perhaps was intended to reproduce it; and the contention that "specific goods" in this section included a portion of a specific thing was urged in the case of *In re Wait* (c) for the purpose of showing that that expression was capable of the same meaning in section 58 (d). That view was accepted by Sargant, L. J., in his dissentient judgment, but it was rejected by the majority of the Court, who held that the phrase "specific goods" in section 58 (d) and, incidentally, in this section, bore the meaning given in the definition; and as regard *Howell v. Coupland*, Atkin, L. J., expressed the opinion that it fell within section 4 (2) (e), as being a case of an agreement for the sale of future goods, subject to the condition that the subject-matter should come into and continue in existence, or would be covered by general principles of law, retained by section 66 (f). It would, therefore, appear that the section applies only to an agreement for the sale of specific goods within the meaning of the definition, and there are so many cases to which the section can apply without extending the meaning of the phrase "specific goods" as to make it impossible to say that to limit it to the meaning given in the definition is repugnant to the context.

Other causes which prevent the performance of the contract, such as supervening illegality by reason of a declaration of war, or Act of Parliament and the like, fall within the general rule relating to impossibility of performance and not within this section, which is a particular instance of that rule peculiar to the sale of goods (g).

The Price.

9. (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

Ascertainment of price.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

(c) (1927) 1 Ch. 606, C. A.
 (d) S. 52 of the English Act.
 (e) S. 5 (2) of the English Act.
 (f) S. 62 of the English Act. In India these provisions are contained in s. 56 of the Indian Contract Act.

(g) See Pollock & Mulla, pp. 305-316; and for a careful analysis of the different matters which will "frustrate" a contract see *Blackburn Bobbin Co. v. T. Allen & Sons* (1918) 1 K. B. 540, per McCardie, J.

Ascertainment of the price.—It has already been seen that in order that a contract may be a contract of sale, it is essential that it should provide for the payment of a money consideration for the goods. It is not, however, necessary that the contract should specify the amount; the parties may leave the price to be determined by such other method as they please (*h*) and when it is so determined the position is the same as if the parties had fixed it by the contract itself (*i*). The price, however, may be fixed in such a manner as to make the contract a wagering contract, in which case it will be unenforceable (*j*).

Moreover, by English law "a contract for the sale of a commodity in which the price is left uncertain is, in law, a contract for what the goods shall be found to be reasonably worth" (*k*), and, consequently, even when the contract is silent as to the method by which the price is to be determined, an agreement to pay a reasonable price will be implied: and what is implied by law is as strong to bind the parties as if it were under their hand (*l*).

Reasonable price.—What is a reasonable price is a question of fact to be determined according to the circumstances of each particular case. Where the goods are such that there is a market price for them, the market price will be evidence of what is a reasonable price between the parties, though not conclusive, as accidental circumstances may make the current price unreasonable in the particular transaction (*m*). A subsequent fixing of the price by agreement of the parties is very strong evidence of what they think and therefore of what for them is reasonable. In principle

(*h*) For examples see *Churchill v. Wilkins* (1786) 1 T. R. 447 (contract by seller to deliver "all his tallow at 4s. per stone and so much more as the buyer paid to any other person"); *Cannan v. Fowler* (1853) 14 C. B. 181 ("at a fair value and in the event of a dispute at an amount to be fixed by arbitration"); *Orchard v. Simpson* (1857) 2 C. B. (N. S.) 299, 109 R. R. 688; *Charrington & Co. v. Wooder* (1914) A. C. 71 ("fair market price"). See also *W. T. Lamb & Sons v. Goring Brick Co.* (1932) 1 K. B. 710, 717, 720, C. A. As to course of dealing see *Re Marquis of Anglesey, Willmot v. Gardner* (1901) 2 Ch. 548, C. A. (agreement to pay interest); *Brown v. Byrne* (1854) 3 E. & B. 703, 97 R. R. 715 (discount).

(*i*) *Birchgrove Steel Co. v. Shaws Brow Iron Co.* (1891) 7 T. L. R. 246, H. L. ("average of weekly official prices"—buyers refused to accept). *Urquhart Lindsay & Co. v. Eastern Bank, Ltd.* (1922) 1 K. B. 318 (price to be increased if cost of labour and materials increased—buyers refused to pay increased price).

Where the contract price is agreed without reference to the Sales Tax, the liability falls on the seller, generally speaking, the price would be inclusive of the tax. *Lowe v. Norman Wright* (1944) 1 All. E. R. 618. For usage of trade, see *Benay Krishna v. North Bengal Sugar Mills Co., Ltd.* (1945) 2 Cal. 173.

(*j*) *Rourke v. Short* (1856) 5 E. & B. 904, 103 R. R. 798.

(*k*) *Hoadly v. M'Laine* (1834) 10 Bing. 482, 487, 38 R. R. 510, 514, per Tindal, C. J., confirmed (not that further authority is needed) by Willes, J., in *Joyce v. Swann* (1864) 17 C. B. (N. S.) 81, p. 102, 142 R. R. 258 and cf. *Valpy v. Gibson* (1847) 4 C. B. 837, 72 R. R. 740.

(*l*) *Hoadly v. M'Laine, supra*. This doctrine appears to be peculiar to English law. The civil law did not recognize it, and if the contract failed to fix the price, or specify the manner in which it was to be ascertained, it was not a contract of sale. See Benjamin on Sale, pp. 162-3, and Chalmers, p. 34.

(*m*) *Acebal v. Levy* (1834) 10 Bing. 376, 383, 38 R. R. 469.

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it seems to be strictly nothing more, unless the circumstances are such that it operates as a novation, but no question of actual importance appears to arise on this. Difficulty may occasionally arise in the application of the rule, as, for instance, when goods have been shipped so as to pass the risk of the buyer, but the exact price is to be determined by weighing or measuring the goods on their delivery from the ship. In such cases, "where the price is not ascertained and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can" (n).

Price to be subsequently arranged by the parties.—Section 8 of the English Act, which this section reproduces, as originally drafted also provided that "the price might be left to be fixed by subsequent arrangement," so that if there was a sale at a price to be subsequently agreed on by the parties there would be a valid contract; as there is a valid contract of insurance "at a premium to be arranged," for if no arrangement is made a reasonable premium is payable (o). Those words, however, were struck out in committee (p) and it would therefore appear that, if the arrangement is that the goods shall be sold at a price to be subsequently agreed, there is no concluded contract, for such a stipulation has the effect of impliedly excluding an agreement to pay a reasonable price, and reserving an option as to the price, which is an essential element in the contract (q).

Presumably, however, if the goods were actually delivered and accepted under such an arrangement, the buyer would have to pay a reasonable price (r).

10. (1) Where there is an agreement to sell the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided:

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(n) *Martineau v. Kitching* (1872) L. R. 7 Q. B. 436, at pp. 455-6, per Blackburn, J., cf. *Castle v. Playford* (1872) L. R. 7 Ex. 98, at pp. 99-100, Ex. Ch.

(o) Marine Insurance Act (1906), s. 31.

(p) Chalmers, p. 34.

(q) Benjamin on Sale, p. 159 and see *Lofius v. Roberts* (1902) 18 T. L. R. 532, C. A. and cases there cited; cf. *Hillas & Co. v. Arcos Ltd.* (1931) 36 Com. Cas. 353, C. A. (reversed on the facts in the

House of Lords) referring to the case of *May & Butcher v. The King*, unfortunately not reported, in which the point under discussion arose and was decided by the House of Lords in accordance with the view above expressed. See *Law Quarterly Review* Vol. 48 (July 1932), p. 310, *et seq.*

(r) cf. *Rose and Frank v. Crompton Bros.* (1925) A. C. 444, and the provisions of the next section.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

Price to be fixed by valuation.—One of the methods of ascertaining the price is to leave it to be determined by the valuation of a third party, and this section specifically deals with that method. As under such a contract there is no other means of fixing the price, the contract is conditional on its being so fixed and consequently if the valuation does not take place there is no contract, and presumably if the proposed buyer has paid any money under it in respect of the goods, he may recover it as on a total failure of consideration, though, as provided by the section, if the buyer has received and taken as his own (s) any part of the goods, he must pay a reasonable price for them. If a time is fixed by the contract for the appointment of a valuer, it is usually of the essence of the contract, so that if the valuer is not appointed by that day, the contract is avoided (t); and if a particular person is named or appointed as a valuer, the task of valuing cannot be delegated to another (u). Neither party, therefore, is liable at all if, without his default, the valuation does not take place, and even if one of the parties wrongfully prevents the valuation from taking place, the only remedy for the other party is an action for damages for preventing the valuation. Moreover, there being no contract, equity cannot decree specific performance (v), though in cases where the Court is of opinion that the appointment of the valuer is not of the essence of the contract (as in an agreement between partners that one shall take over the assets of the partnership from the other at a valuation) it may ascertain the value for itself and decree specific performance after so ascertaining the price (w). In appropriate cases too it may make a mandatory order on the party obstructing the valuation to allow the valuation to proceed (x).

Completion and questioning of valuation.—The valuation is completed when everything necessary for the valuation has been ascertained and no more remains to be done but the arithmetical calculation (y). It may, however, be questioned if the valuer has proceeded on a wrong standard, or taken into account things which by the agreement ought to have been omitted.

(s) This is the meaning of the term "appropriated" in the proviso. It is not used in the technical sense which it bears in s. 23. The proviso is based upon *Clarke v. Westrope* (1856) 18 C. B. 765, 107 R. R. 607.

(t) *Tew v. Harris* (1847) 11 Q. B. 7, 75 R. R. 270.

(u) *Ess v. Trustcott* (1837) 2 M. & W.

385, 46 R. R. 630.

(v) *Vickers v. Vickers* (1867) L. R. 4 Eq. 529.

(w) *Dinham v. Bradford* (1870) L. R. 5 Ch. App. 519.

(x) *Smith v. Peters* (1875) L. R. 20 Eq. 511.

(y) *Gordon v. Whitehouse* (1856) 18 C. B. 747.

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Valuation and Arbitration.—A valuation must be distinguished from arbitration which pre-supposes a dispute, and moreover, is something in the nature of a judicial proceeding, so that it may amount to misconduct on the part of the arbitrator to refuse to hear evidence. A valuer, however, is not bound to do so (z). Consequently if an actual dispute has arisen about the price, a reference to a third party to settle it may amount to a submission to arbitration, and, on the other hand, a valuation may be included in an arbitration clause in a contract or in a reference to arbitration (a).

Valuation by two valuers.—Where the agreement provides for a valuation by two valuers, one to be appointed by each party, notice of the appointment by each must be given to the other (b). A valuation by one valuer only in such a case is no valuation, unless it is expressly agreed that if one of the parties fails to appoint a valuer, or that valuer refuses to act, or is prevented from acting, the valuer appointed by the other party may make the valuation by himself (c). In such cases it is frequently agreed that if the two valuers cannot agree on the value, they may refer the matter to an umpire, but even in such a case the reference to the umpire does not of itself amount to a submission to arbitration, and his decision is not necessarily an award (d). If valuers accept the appointment for reward, they will be liable in damages to the parties for neglect or default in performing their duties (e).

Conditions and Warranties.

11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of some stacks of oak on the seller's ground, upon the terms that they might remain there for four months and the buyer should pay for them within twelve weeks of the contract. The seller on the expiration of the twelve weeks demanded the price which the buyer failed to pay.

(z) *Bos v. Helsham* (1866) L. R. 2 Ex. 72; *Re Carus-Wilson and Greene* (1886) 18 Q. B. D. 7, C. A.; *Re Dawdy* (1885) 15 Q. B. D. 426, C. A.; *Re Hammond and Waterton* (1890) 62 L. T. 808. As to arbitration generally, see Pollock and Mulla, pp. 205-213.

(a) *Stewart v. Williamson* (1910) A. C. 455.

(b) *Thomas v. Fredricks* (1847) 10 Q. B. 775, 74 R. R. 502; *Tew v. Harris* (1847) 11 Q. B. 7, 75 R. R. 270.

(c) *Tew v. Harris*, *supra*.

(d) *Re Carus-Wilson and Greene*, *supra*.

(e) *Jenkins v. Betham* (1885) 15 C. B. 168, 100 R. R. 297; *Cooper v. Shuttleworth* (1856) 25 L. J. Ex. 114, 105 R. R. 346.

Later the buyer asked for further time which the seller refused to give, and said that as the buyer had not paid he should not have the stacks. The buyer later tendered the price, but the seller refused to accept it and subsequently resold the stacks. The buyer was held entitled to recover in an action of trover (f).

(2) Sale of a perishable cargo c.i.f. Lisbon, payment to be made by cash in London in exchange for bill of lading and insurance policy. Shortly after the arrival of the ship at Lisbon the seller tendered the documents to the buyer in London, but the buyer failed to pay. The seller was held entitled to treat the contract as repudiated (g).

(3) Sale of goods c.i.f. Antwerp, October shipment, subject to a term in the contract that whatever the difference of the shipment might be in value from the grade, type or description specified, the buyers should not be entitled to reject the delivery. Owing to a strike at the port of loading the goods were not shipped until November. The buyers were held entitled to reject (h).

(4) Sale of goods to be shipped and bill of lading to be dated December-January. Goods were shipped on January 30th but the bill of lading was dated February 2nd. The buyer was held entitled to reject (i).

Stipulations as to time of payment.—As punctual payment does not go to the whole consideration of the sale, the failure by the buyer to pay on the appointed day does not, as a rule, entitle the seller to treat the contract as repudiated (j), though he may be entitled to withhold delivery until the price is paid and re-sell the goods if the buyer does not pay or tender the price within a reasonable time (k). Consequently if before such re-sale the buyer tenders the price, even though it be on a date after the date named in the contract the seller cannot, in the absence of a stipulation to the contrary, treat the contract as at an end and refuse to allow the buyer to have the goods: and a subsequent re-sale by him will be tortious (l).

The parties may, needless to say, stipulate that the time of payment shall be of the essence of the contract (m), and in a c.i.f. contract, where the

(f) *Martindale v. Smith* (1841) 1 Q. B. 389, 55 R. R. 285.

(g) *Ryan v. Ridley & Co.* (1902) 8 Com. Cas. 105.

(h) *J. Aron & Co. v. Comptoir Wegmont* (1921) 3 K. B. 435.

(i) *In Re General Trading Co. & Van Stolk's Commissiehandel* (1911) 16 Com. Cas. 95.

(j) *Martindale v. Smith*, *supra*, example (1).

(k) See ss. 47 and 54.

(l) *Martindale v. Smith*, *supra*; *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Cas. 434, at p. 444; *Payzu, Ltd. v. Saunders* (1919) 2 K. B. 581, C.A.

(m) *Ebbw Vale Steel & Iron Co. v. Blaina Iron & Tinplate Co.* (1901) 6 Com. Cas. 33 C. A.; *Baldeo Doss v. Howe* (1881) 6 Cal. 64; *Burn & Co. v. Morris State* (1926) 30 Cal. W. N. 145, 90 I. C. 52, (25) A. P. C. 188.

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stipulation is cash against documents, a refusal by the buyer to pay on tender of the documents will entitle the seller to treat the contract as repudiated and immediately to sue the buyer for non-acceptance (n). And where the contract is for delivery of goods by instalments, each instalment to be paid for on delivery, failure to pay for one instalment may entitle the seller to repudiate the contract (o).

Stipulation as to time of performance of other terms.—As the Act deals with all kinds of contracts of sale, and not only with the contracts of commerce, the enactment as to stipulations as to time, other than as to the payment of the price, is necessarily put in somewhat general language. If a man orders a suit of clothes, a promise by the tailor that he shall have it by a certain date would not, generally speaking, be of the essence of the contract, though it might be if he was ordering court dress for the purpose of attending a Court on a particular day. But in the case of commercial contracts although occasionally stipulations as to time may not be of the essence (p), the usual rule is that they are, and as regards such contracts, as pointed out by McCardie, J., in *Hartley v. Hymans* (q), “this section gives a very slender notion of the existing law, and it is well to remember section 61 which provides *inter alia*: ‘(2) the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act... shall continue to apply to contracts for the sale of goods’ (r). Now the common law and the law merchant did not make the question whether time was of the essence depend on the terms of the contract, unless indeed those terms were express on the point. It looked rather to the nature of the contract and the character of the goods dealt with. In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery: see per Lord Cairns, L. C., in *Bowes v. Shand* (s), per Cotton, L. J., in *Reuter v. Sala* (t) and per Lord Esher, M. R., in *Sharp v. Christmas* (u). In *Paton & Sons v. Payne & Co.* (v), however, it was held by the House of Lords that in a contract for the sale and delivery of a printing machine time was not of the essence.” The learned Judge concludes by quoting, with approval, the passage in Blackburn on Sale “in mercantile contracts stipulations as to time

(n) *Biddell Brothers v. E. Clemens Horst & Co.* (1912) A. C. 18; *Ryan v. Ridley*, *supra*, example (2).

(o) S. 38 (2).

(p) *Kidston & Co. v. Monceau Iron-works Co.* (1902) 86 L. T. 556, 7 Com. Cases 82.

(q) (1920) 3 K. B. 475, 483.

(r) The corresponding provision in this Act is contained in s. 66 (e).

(s) (1877) 2 App. Cas. 455, 463, 464 (sale of rice).

(t) (1879) 4 C. P. D. 239, 249 (sale of pepper).

(u) (1892) 8 T. L. R. 687 (sale of potatoes).

(v) (1897) 35 S. L. R. 112. This was an isolated transaction, and not one on which many others might depend, as in the usual commercial transactions.

(except as regards time of payment) are usually of the essence of the contract" (w).

Accordingly, stipulations contained in a contract of sale of goods "to arrive," as to the time at which the seller shall notify the name of the ship on which they are expected (x), stipulation as to the date of shipment (y), as to the date that a bill of lading bears or shall bear (z), or as to the date of the clearance of the ship on which the goods are loaded (a), are all usually of the essence of the contract.

The courts of equity in England in dealing with contracts for the sale of land do not regard time of the essence of the contract except in peculiar circumstances (b), but an attempt to introduce this doctrine into the law relating to the sale of goods after the passing of the Judicature Act, 1873, on the ground that the rules of equity prevailed over the rules of common law, decisively failed. "It was argued," said Cotton, L. J., in dealing with that proposition (c) "that the rules of courts of equity are now to be regarded in all Courts, and that equity enforced all contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable."

In the cases decided before the English Act, stipulations as to time, such as the time of shipment or delivery, were often spoken of as part of the description of the goods; but both the English Act and this Act treat the two conditions as distinct and they cannot now be regarded as the same thing. "I agree" said McCardie, J., in the case of *Aron & Co. v. Comptoir Wegimont* (d) "that in one sense the time of shipment is part of the description of the goods. Indeed in *Bowes v. Shand* (e) Lord Cairns said: 'That is part of the description of the subject-matter of what is sold.' So it is, I agree, in one sense, but.....the express

(w) Cf. Pollock and Mulla, pp. 301-305; *Bhudar Chandra v. Betts* (1915) 22 Cal. L. J. 566, 33 I. C. 347; *Delhi Cloth Mills Co. v. Kanhia* (1913) Punj. Rec. No. 80, 285, 19 I. C. 93; *Balaram, etc., Firm v. Govinda Chetty* (1925) 49 Mad. L. J. 200, 91 I. C. 257, ('25) A. M. 1232.

(x) *Busk v. Spence* (1815) 4 Camp. 329; *Graves v. Legg* (1854) 9 Ex. 709, 96 R. R. 931.

(y) *Bowes v. Shand* (1877) 2 App. Cas. 455; *Aron & Co. v. Comptoir Wegimont*, *supra*. As to the meaning of "shipment" see *Mowbray Robinson & Co. v. Rosser* (1922) 91 L. J. K. B. 524, C. A.; *Foreman & Ellams v. Blackburn* (1928) 2 K. B. 60;

Wilson v. Wright (1937) 4 A. E. R. 371 (Goods to be shipped by "Saturday's steamer").

(z) *Re General Trading Co. & Van Stolk's Commissiehandel*, *supra*, example (4); cf. *Berg v. Landauer* (1925) 42 T. L. R. 142; *Finlay v. Kwik* (1929) 1 K. B. 400, C. A.

(a) See *Thalmann v. Texas Star Flour Mills* (1900) 82 L. T. 833, C. A.

(b) See Pollock and Mulla, pp. 301-303.

(c) *Reuter v. Sala* (1879) 4 C. P. D. 239, at p. 249, C. A.

(d) *Supra*, example (3) at p. 440.

(e) 2 App. Cas. 455, 468.

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requirement of a contract that goods shall be shipped at a particular period is a good deal more than a mere description of the goods within section 13 of the Sale of Goods Act, 1893 (f); it is an express term of the contract independent of that which is generally known as the description of the goods: it is, I think, a condition precedent.....that the goods shall be shipped as required by the contract." Accordingly it was held that the buyer, notwithstanding the clause precluding him from rejecting the goods for errors in the description, might reject the goods as they were shipped late.

Waiver of the stipulations.—Stipulations as to time may be waived by the party in whose favour they are inserted either expressly or by implication, and if he does so he cannot afterwards treat the failure to comply with them by the other party as giving a right to rescind the contract (g). There can, strictly speaking, be no waiver after breach, but to accept goods, though delivered late, is often spoken of as a waiver of the condition, but more strictly it is an accord and satisfaction of the right of action which the breach has given. Under section 55 of the Indian Contract Act to do so without protest precludes any right of action for the late delivery. That section also governs cases of contracts of sale where the stipulations as to time are not of the essence of the contract (h).

12. (1) A stipulation in a contract of sale with reference
Condition and to goods which are the subject thereof
warranty. may be a condition or a warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(f) S. 15 of this Act.

(g) *Hickman v. Haynes* (1875) L. R. 10 C. P. 598; *Potts & Co. v. Brown, Macfarlane & Co.* (1925) 30 Com. Cas. 64, H. L.; *Levey v. Goldberg* (1922) 1 K. B. 688;

Muhammad Habib Ullah v. Bird & Co. (1921) 48 I. A. 175, 43 All. 257, 63 I. C. 589, (1922) A. P. C. 178.

(h) See Pollock and Mulla, pp. 301, 305.

Conditions and warranties.—This section is in effect an additional definition or interpretation section and supplies a want long felt in India.

At the time when the Indian Contract Act was passed the phrase “warranty” had been and was used with several different meanings and shades of meaning, and the difficulty had been increased by some of those meanings overlapping some of the meanings of the word “condition.” The Indian Contract Act used the word “warranty” in this ambiguous sense and did not define it. The result was that the Courts had to decide on the construction of each section whether the word “warranty” was used in the strict sense in which it was used in English law, as it was in section 117, or in the wider sense of the English “condition,” as it was in section 118 (i). The present Act avoids this confusion and uses the words “condition” and “warranty” and draws a clear distinction between the two. Full discussion on these points may be found in the works of Sir William Anson and Sir Mackenzie Chalmers, and the following summary must here suffice.

In the first place it is to be borne in mind that a contracting party is bound to perform his contract according to its terms, to deliver the specific goods, if he sold ascertained goods, or to supply goods answering the description in the contract if he contracted to sell goods not ascertained. Offer of a thing different from what was contracted for is not a breach of one term, but a total failure to perform the contract. “If a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it” (j). The existence of special conventional provisions as to this or that part of the contract does not derogate from the duty of performance as a whole.

Express conditions.—Now the parties, if such is their will, may put the contents of any particular statement, or promise, which passes between them, on the same footing as the description of the thing contracted for, so that if it is not made good by the party undertaking it, the failure is deemed to be a total failure of performance, and the other is wholly discharged at least, and may in addition recover damages for such failure of performance. This is a condition in the proper sense and sub-section (2) so defines it.

(i) See *Buch v. Goverdhandas* (1922) 24 Bom. L. R. 991, 70 I. C. 877, ('23) A. B. 92; *Nagardas v. Velmahomed* (1930) 32 Bom. L. R. 454, 458, 126 I. C. 312, ('30) A. B. 249.

(j) Lord Abinger, C.B., in *Chantler v.*

Hopkins (1838) 4 M. & W., at p. 404, 51 R. R., at pp. 654-655, approved in Ex. Ch.; *Azemar v. Casella* (1867) L. R. 2 C. P., at p. 679; *Drummond v. Van Ingen* (1887) 12 App. Cas. 284.

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Express warranties.—There may also be, and there occur in common practice, auxiliary promises or undertakings of which the breach is not intended to avoid the contract, but only to give a remedy in damages. These are warranties in the proper sense, and the sense in which sub-section (3) defines the term. A condition of sale, protecting a seller in respect of misdescription, may be overridden by a warranty given before the sale takes place and damages may be recovered for breach of the warranty (*k*).

Representations.—An affirmation as regards the goods in order that it may amount to a stipulation must be part of the contract; if it is not, it is only a representation, the untruth of which will not, in the absence of fraud, give rise to an action for damages (*l*), though it may enable the other party to rescind the contract (*m*), and sometimes a representation may amount to a condition precedent to the formation of the contract, so that, if it be untrue, the other party is discharged from all liability (*n*). It must therefore depend upon the intention of the parties whether an affirmation made at the time of, or during the negotiations for, the sale, is to be treated as a condition, a warranty or a mere representation: and although an assertion made by the seller of a fact unknown to the purchaser may be strong evidence that it was intended as a warranty (*o*), it is not necessarily so in law (*p*). A statement made after the contract is completed, however, does not amount to a warranty, unless there is some fresh consideration given for it, as in the absence thereof there is no consideration to support it (*q*). Similarly if the stipulation be part of the contract, it must again depend on the intention of the parties, to be inferred from all the circumstances of the case, whether it be a condition or a warranty (*r*); and the mere fact that it is called a warranty will not necessarily prevent it from being a condition (*s*).

But a condition may include a warranty, that is to say, a seller's undertaking may be such that the buyer may waive it as a condition by accepting performance or otherwise, but may still have a remedy in damages for the failure in that particular undertaking (*t*).

(*k*) *Couchman v. Hill*, (1947) 1 All. E. R. 103.

(*l*) See for example *Hopkins v. Tanqueray* (1854) 15 C. B. 130, 100 R. R. 271; *Harrison v. Knowles & Foster* (1918) 1 K. B. 608, C. A. For a full discussion see Benjamin on Sale, pp. 686-705, where all the cases are collected.

(*m*) Indian Contract Act ss. 18 & 64; *Pollock & Mulla*, pp. 110-116, 340-356.

(*n*) *Bannerman v. White* (1861) 10 C. B. (N. S.) 844, 128 R. R. 953.

(*o*) *De Lassalle v. Guildford* (1901) 2 K. B. 215, at p. 221, C. A.

(*p*) *Heilbut Symons & Co. v. Buckleton* (1913) A. C. 30, per Lords Haldane and Moulton.

(*q*) Per Holt, C. J., *Lysney v. Selby* (1705) 2 Lord Raymond 1118; *Roscorla v. Thomas* (1842) 3 Q. B. 234, 61 R. R. 216.

(*r*) *Behn v. Burness* (1863) 3 B. & S. 751, 124 R. R. 794; *Bentzen v. Taylor* (1893) 2 Q. B. 274, at p. 280, C. A.; *Harrison v. Knowles & Foster* (1917) 2 K. B. 606, at p. 610.

(*s*) Sub-section (4). *Barnard v. Faber* (1893) 1 Q. B. 340, C. A.

(*t*) See section 13.

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Implied conditions and warranties.—Although the parties may have used no express words that would create such a stipulation, the law annexes to many contracts conditions, the breach of which may be treated by the buyer as avoiding the contract, or if he exercises his right of waiver, as giving a right to damages. These are called implied conditions and are enforced on the grounds that the law infers from all the circumstances of the case that the parties intended to add such a stipulation to their contract, but did not put it into express words (*u*), and it is such implied conditions that are dealt with in sections 14-17.

The existence of an implied condition of warranty may be rebutted by proof of facts which show a contrary intention.

Confusion has been created in this branch of the law, which is avoided by the Act, by use of the term “implied warranty” to denote what is really an implied condition. Sometimes, however, a warranty in the strict sense of the term is implied by law where no inference would arise of an implied condition (*v*).

13. (1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

When condition
to be treated as
warranty.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Voluntary waiver of a condition.—As appears from the previous section, the failure of the seller to fulfil a condition to be performed by him entitles the buyer to treat the contract as repudiated, and to refuse to accept the goods, and, if he has already paid for them, to recover the price. Nor is this right put an end to by the mere fact that the goods have been delivered to him, for he has the right to examine them (*w*) and

(*u*) See *The Moorcock* (1889) 14 P. D. 64, at p. 68, per Bowen, L. J.

(*v*) Section 13 (2).

(*w*) Section 41, and compare s. 17 (2).

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to reject them, if on that examination he finds that they are not according to contract. It is always, however, open to a party to a contract to dispense with the performance of a stipulation inserted therein for his sole benefit, and it is well established in English law that a buyer may, if he wishes, retain the goods, though he has the right to reject them, and none the less rely on the breach of the condition as entitling him to pecuniary compensation (*x*), which he may recover by the different methods pointed out by section 59. In that case, however, he remains liable to the seller for the price. In some systems this right of election does not exist, as used to be the case in Scotland, therefore in such systems the buyer cannot keep goods which he is entitled to reject and claim damages; in other words by waiving the performance of the condition he waives it for all purposes. This may occur in certain cases in Indian law, as when the buyer voluntarily extends the time for delivery, or accepts the goods without protest though tendered after the stipulated time.

Compulsory waiver of a condition.—The buyer, however, may, besides thus voluntarily electing to waive the performance of the condition, preclude himself from relying upon its non-performance as a repudiation by the seller of the contract by doing some act which amounts to an acceptance (*y*) of the goods, or (where the contract is an entire contract) part of the goods, *e.g.*, by exercising some right of a proprietary character over them such as by directing delivery to be made to third parties (*z*), or reselling part of them without examination (*a*): or he may accept them, because the examination has not revealed some latent defect, or has failed to show that they are not of the stipulated description (*b*). In such cases the buyer is in the same position as if he had voluntarily and intentionally waived the performance of the condition, and can only rely upon his right to claim damages from the seller. This rule is but an instance of the general rule of law, that though a party to a contract may refuse to perform his promise, if the other party has failed to perform a condition upon which that promise was made dependent, yet, if he accepts a substantial part of that which was to be performed in his favour, he can no longer refuse to do his part, for in the latter case there has not been a total failure of the consideration for his promise: and “where a promise goes only to part of the consideration and a breach of it may be paid for in damages” it is an independent promise, and the breach of it does not absolve the promisee from performing his part of the contract,

(*x*) See *Mondel v. Steel* (1841) 8 M. & W. 858, 58 R. R. 890.

(*y*) For the meaning of acceptance see s. 42. As regards severable contracts see s. 38.

(*z*) *Haridas v. Kalumull* (1903) 30 Cal. 649.

(*a*) *Hardy & Co. v. Hillerns* (1923) 2 K. B. 490, C. A.

(*b*) *Nagardas v. Velmahomed* (1930) 32 Bom. L. R. 454, 126 I. C. 312, ('30) A. B. 249; *Jatindra Chandra Banerjee v. Muralidhar* (1926) 43 Cal. L. J. 126, 94 I. C. 873, ('26) A. C. 749.

and he is therefore confined to his right to recover damages for that breach (c). The condition may be express or implied (d).

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Results of waiving a condition.—A warranty being a stipulation which is collateral to the main purpose of the contract never goes to the whole consideration, and for this reason the buyer's promise to pay the price is not dependent upon its performance and a breach of it therefore does not entitle him to repudiate the contract, but he must rely upon the remedies provided by section 59. It is, therefore, a convenient method of expressing the legal results of this particular instance of the general rule to say that the buyer may elect or be compelled to treat the breach of the condition as a breach of warranty, but this does not mean that the condition becomes a warranty, but only that the legal remedies for the breach of the condition become limited to the remedies which exist in the case of a breach of warranty. Hence a term in the contract expressly excluding warranty does not affect the buyer's right to recover damages for the breach of a condition (e).

Unless, however, the buyer has thus accepted a part of the benefit of the execution of the contract in his favour, or waived the performance of the condition, the condition must, in the case of a contract for unascertained goods, be fully complied with by the seller, and the buyer cannot be called upon to accept the goods with an allowance for a partial failure to perform it. Thus, where the goods actually delivered are not of the quality stipulated for, evidence is not admissible of a custom of the trade which requires the buyer to accept the goods with an allowance for inferior quality, such a custom being inconsistent with the express terms of the contract (f).

Sale of specific goods.—In the case of the sale of specific goods, however, the case is more difficult, and the language of sub-section (2), which reproduces section 11 (1) (c) of the English Act, is somewhat obscure. Since the case of *Street v. Blay* (g) it has been treated as well settled in

(c) Notes to *Pordage v. Cole*, 1 Wms. Saunders (1871), p. 552, citing *Boone v. Eyre* (1777) 1 Hy. Bl. 273 (a) "Where A by deed conveyed to B the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it in consideration of £500 and an annuity of £160 for life and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes and B should quietly enjoy: and B covenanted that A well and truly performing all and everything therein contained on his part to be performed, he would pay the annuity; in an action by A against B on this covenant, the breach assigned was the non-payment of the annuity; plea that A was not at the time legally possessed of

the negroes on the plantation, and so had not a good title to convey. The Court of King's Bench on demurrer held the plea to be ill, and added that if such a plea were allowed, any one negro not being the property of A would bar the action."

(d) *McKenzie v. Nagendra Nath*, 50 C. W. N. 213.

(e) *Wallis v. Pratt* (1911) A. C. 394; *Baldry v. Marshall* (1925) 1 K. B. 260, C. A.; *McKenzie v. Nagendra Nath*, 50 C. W. N. 213.

(f) *Ruttonsi Rowji v. Bombay United Spinning & Weaving Co., Ltd.* (1916) 41 Bom. 518, 538-540, 37 I. C. 271.

(g) (1831) 2 B. & Ad. 456, 36 R. R. 626.

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English law that the purchaser cannot avoid the sale of a specific chattel, except under an express condition in the contract or for fraud, after the property has passed (*h*) and the property may and often does pass before delivery and acceptance (*i*), and stipulations, which, in the case of unascertained goods, might be regarded as conditions were, in the case of specific goods, regarded as warranties only. Thus in speaking of a clause in a contract that goods should be similar to sample, Blackburn, J., said "Generally speaking, when the contract is as to any (*i.e.*, unascertained) goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages" (*j*). Similarly "If a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee, having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract: see *Bannerman v. White* (*k*)), but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed" (*l*).

The section is, perhaps, intended to express and may possibly be construed as giving effect to this rule of the common law, and if this is the correct interpretation the provisions of sections 16 and 17, in so far as they relate to a sale of specific goods, must be read subject to it. Specific goods may, however, be sold by description (*m*), and it is conceived that, when this is the case, such stipulations will, as in the case of the sale of unascertained goods, amount to conditions though the goods are specific, and the provision relating to the sale of specific goods, whatever its precise effect will only apply to those cases in which the buyer does not rely upon the description. The language, however, is not very happy, and logically comes very near to being a contradiction in terms; for if the property passes despite the non-fulfilment of the stipulations, the stipulations are not conditions at all, whereas if the stipulations are conditions, the property does not pass if they are not fulfilled, unless the buyer waives their

(*h*) See *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438, at p. 449; *Behn v. Burness* (1863) 3 B. & S. 751, at pp. 755-6, 124 R. R. 794, 797.

(*i*) See section 20.

(*j*) *Heyworth v. Hutchinson* (1887)

L. R. 2 Q. B. 447, 451.

(*k*) 10 C. B. N. S. 844.

(*l*) *Per Curiam, Behn v. Burness, supra*, at pp. 755-756.

(*m*) See note to section 15.

performance by accepting the goods or otherwise. It is suggested, indeed, that the section has in view cases where the property passes by the buyer's subsequent acceptance of the goods (n), but it can be objected to this interpretation, in the first place that the sub-section contains no such limitation, and in the second that there would appear to be no reason for dealing thus specially with specific goods, as the result of the buyer's acceptance is sufficiently dealt with by sub-section (1) and the remaining words of this sub-section. There does not appear, however, to have been any judicial interpretation of this provision, and consequently no confident view can be expressed upon its exact meaning and effect. In a recent case (o) Ameer Ali, J., discussed the meaning of this sub-section in reference to the sale of specific goods by sample and came to the conclusion that the sub-section applied to the case of "bargain and sale," that is to say, where upon a sale of goods the property has passed to the purchaser, and the contract has been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment.

Impossibility of performance.—Sub-section (3) does not mean that the buyer can be called upon to perform his promise, if a condition to be performed by the seller is not fulfilled by reason of its having, at the time of the contract or subsequently, become impossible of performance; for whatever be the reason for the non-performance (unless it be due to the fault of the buyer), the buyer is released from liability (p). It merely saves the rights of the seller, in appropriate cases, to rely upon the impossibility as an excuse to himself, if sued by the buyer (q).

The sub-section, however, is wide enough to cover cases in which the default of the buyer renders the performance of the condition impossible; in such cases the buyer cannot rely upon the non-performance of the condition and is deemed to have waived it and therefore is in the same position as if it had been fulfilled (r). He may, indeed, waive the performance of all conditions by repudiating his own obligations (s) or by incapacitating himself from carrying them out (t).

Government controls.—Controls imposed by Government after the contract is made frequently give rise to the question of impossibility of performance. No general rule can be laid down. The determining factors are the terms of the contract in each case and sometimes trade

(n) See Benjamin on Sale, p. 589.

(o) *Lalchand v. Baijnath* (1937) 63 Cal. 736, 169 I. C. 128, ('37) A. C. 140.

(p) See Benjamin on Sale, p. 584.

(q) Indian Contract Act, s. 56, Pollock & Mulla, pp. 306-316.

(r) Indian Contract Act, s. 53, Pollock

& Mulla, pp. 297-298.

(s) *Cort v. Ambergate Ry. Co.* (1851) 17 Q. B. 127, 85 R. R. 369; *Jureidini v. National British Insurance Co.* (1915) A. C. 499. See further note to s. 60.

(t) *Inchbald v. Western Neilgherry Coffee Co.* (1864) 17 C. B. N. S. 733, 142 R. R. 603.

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usage. In *Brandt v. Morris & Co. Ltd.* (1917) 2 K.B. 784, the contract was for monthly deliveries of aniline oil over five months "f.o.b. Manchester." After the contract was made, the export of aniline oil was prohibited by an Order of Council, and the prohibition was in existence during the greater part of the five months, but licences for export were being granted in certain cases. It was held that the obligation of applying for a licence lay upon the buyers and not upon the sellers. In *Taylor & Co. v. Landauer & Co.* (1940) 4 K. B. D. 535, the contract was an ordinary c.i.f. contract under which the sellers were bound, in due course, to give notice of appropriation and to tender documents. Before the due date of notice and tender, war broke out and an Order of Council was made forbidding the buying or selling cereals outside the United Kingdom without a licence. It was held that the Order did not have the effect of defeating or putting an end to the contract. The duty of the sellers was to apply for a licence to enable them to perform the contract. There was no reason to suppose that the licence, if applied for, would not have been granted and the sellers were not, therefore, excused from performance of the contract.

14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is—
 Implied undertaking as to title, etc.

- (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Examples.—The section may be illustrated by the following examples:—

(1) Sale of a motor car. After the buyer had used it for some months it was discovered that the car was stolen and the buyer was compelled to return it to the true owner. The buyer was held entitled to recover the price from the seller (u).

(2) The seller sold to the buyers a quantity of tins of condensed milk bearing the name "Nissly Brand"; this was an infringement of a registered

(u) *Rowland v. Divall* (1923) 2 K. B. 500, C. A.

trade mark of a firm of manufacturers of condensed milk. The buyers, in order to make use of the goods, were compelled to remove the labels and then sold the goods unlabelled at the best price which they would fetch. The sellers were held to have committed a breach of the implied condition that they had a right to sell, and also of the implied warranty that the buyers should have and enjoy quiet possession of the goods (*v*).

Seller responsible for title.—It was formerly said that by the common law the seller of goods was not bound unless by express agreement to answer to his title to the goods sold, but the exceptions allowed to the supposed rule were in the modern authorities of more importance than the rule, and in 1851 Lord Campbell, C.J., definitely said that the exceptions had well-nigh eaten up the rule (*w*). It was admitted that there was an "implied warranty of title" if the seller affirmed the goods to be his own, and he was deemed to make that affirmation when goods were sold at a shop or warehouse where the seller usually dealt with such goods. Further, it was allowed that on a sale of unascertained goods, the seller answered for his title (*x*). On the whole it seemed to be the modern common law, and it is certainly so held in America, that the occasions when the seller does not warrant his title are really exceptional. One class of such occasions is where the seller is executing an authority given by law which overrides the general owner's title, as on the sale of a forfeited pledge by a pawnbroker (*y*), or goods taken in execution by a sheriff (*z*), or where he derives his title through a sale under such authority. There may also be an understanding in fact between the parties that the seller is dealing only with such interest as he may have; in that case the implied condition is on general principles excluded (*a*). However this may be, the present section, based upon section 12 of the English Act, has given effect to the modern view. The inclusion of the words in the section "unless the circumstances of the contract are such as to show a different intention" preserves recognition of the exceptional cases like that of the sale of goods taken in execution (*b*), and the Indian authorities have followed the English rule (*c*). The title

(*v*) *Niblett, Ltd. v. Confectioners' Materials Co., Ltd.* (1921) 3 K. B. 387, C. A.

(*w*) *Sims v. Marryat* (1851) 17 Q. B. 281, 85 R. R. 462.

(*x*) See *Eichholz v. Bannister* (1864) 17 C. B. N. S. 708, 142 R. R. 594, and citation thereof in *Framji v. Hormasji* (1877) 2 Bom. 258, 263.

(*y*) *Morley v. Attenborough* (1849) 3 Ex. 500, 77 R. R. 709.

(*z*) *Ex parte Villars* (1874) L. R. 9 Ch. App. 432, 437, but an express assertion that the goods are the property of the execution debtor will amount to a warranty to the buyer to the extent, at all events, of the purchase money in the

hands of the sheriff or execution creditor; *Framji v. Hormasji* (1877) 2 Bom. 258. And the sheriff is liable if he knows that he has no title to sell; *Peto v. Blades* (1814) 5 Taunt. 657, 15 R. R. 609.

(*a*) *Bagueley v. Hawley* (1867) L. R. 2 C. P. 625, where the Court was divided in opinion upon the facts.

(*b*) See per Atkin, L. J., *Niblett v. Confectioners' Materials Co., Ltd.* (1921) 3 K. B., at p. 401.

(*c*) *Dorab Ally Khan v. Executors of Khajah Moheoordeen* (1878) 3 Cal. 806, 813, L. R. 5 I. A. 116—a sheriff selling property taken in execution does undertake that he is acting within his jurisdiction, *ib.*

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which the seller must have is the complete right of disposal, and therefore "if he can be stopped by process of law from selling," as when the sale of the goods infringes a patent or trade mark of third persons, "he has not the right to sell" (d). If the buyer has in fact some use of the goods before the seller's want of title is discovered, the breach of contract and failure of consideration on the seller's part are not affected (e). As regards the position of an auctioneer, see the note to section 64.

Warranty for quiet enjoyment.—In a case relating to immoveable property (f), Lord Ellenborough thus distinguished the covenant for title and the covenant for quiet enjoyment:—"The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey....The covenant for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbances thereupon;" and this covenant is not broken until there is an actual disturbance, either by the lawful act of some third party or by any act of the vendor or those claiming under him; and "probably this warranty resembles the covenant for quiet enjoyment of real property by a vendor who conveys as beneficial owner in being subject to certain limitations, and only purports to protect the purchaser against lawful acts of third persons and against breaches of the contract of sale and tortious acts of the vendor himself" (g). Since, however, the condition as to title amounts to an undertaking by the seller that he has the complete right of disposal of the goods, and the condition is broken if by reason of the seller's defective title the buyer is subsequently disturbed in his possession of the goods by the lawful act of a third party, this warranty is, as regards such cases, superfluous. And as regards cases in which the buyer is prevented from obtaining possession of the goods by such an act, the buyer would appear to have a sufficient remedy under section 31 and need not rely on this implied warranty: and similarly with respect to other breaches of contract or tortious acts of the seller. It is therefore not easy to see what remedies the buyer has by reason of this warranty which he has not independently of it: and it would be of more importance in a system under which the seller does not profess to transfer ownership but only the undisturbed possession of the goods.

(d) *Niblett v. Confectioners' Materials Co., Ltd.* (1921) 3 K. B. 387, C. A., example (2), at p. 398.

(e) *Rowland v. Divall* (1923) 2 K. B. 500, C. A., example (1). The Court below had held that the buyer could not in the circumstances recover back the whole of the purchase money, but only damages. In such a case the onus is on the seller to prove his title; *Kishan v. Bishan* (1925) 7 Lah. L. J. 148, 86 I. C. 1020, ('25) A. L. 366. The judgment of

the Criminal Court is not receivable in evidence to prove that the goods were stolen, *ib.*; cf. *Buller v. Brooks* (1930) 142 L. T. 576, 577.

(f) *Howell v. Richards* (1809) 11 East. 633, 642, 11 R. R. 287, 295.

(g) Per Atkin, L. J., *Niblett v. Confectioners' Materials Co., Ltd.* (1921) 3 K. B. 387, C. A., at p. 403. This warranty, no doubt, was broken in that case: but it was unnecessary for the buyer to rely upon it.

Warranty of freedom from encumbrances.—This warranty amounts to a promise by the seller that the buyer's possession shall not be disturbed by reason of the existence of an encumbrance, and there will be a breach of it if the buyer is compelled to discharge any such encumbrance. The practical effect of it appears to be that, if the buyer does discharge such an encumbrance, he may recover the amount from the seller, by virtue of the provisions of section 69 of the Indian Contract Act, for it will not be a voluntary payment (h), and the sub-section makes it clear that in the absence of an agreement to the contrary the buyer does not buy subject to encumbrances. Such an agreement, however, will be implied if such encumbrances were declared to the buyer when the contract was made or he had notice of them.

15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by description.

Examples.—The section may be illustrated by the following examples :—

(1) Contract for the sale of sawn laths to be shipped at Wasa for Hull of "about the specification stated:" the property to pass to the buyer on shipment and "should any dispute arise under the stipulations of the contract, the buyers should not be entitled to reject any of the goods but the dispute should be referred to arbitrators." The goods did not substantially agree with the specification. The buyers were held entitled to reject the goods notwithstanding the arbitration clause (i).

(2) Sale of copra cake "not warranted free from defect rendering same unmerchantable, which would not be apparent on reasonable examination". The cake was adulterated with castor beans so that it could not be described as copra cake. The buyers having accepted the goods were still entitled to recover damages for the breach of the condition (j).

(3) Sale of a ship advertised as copper-fastened to be taken with all faults without allowance for any defects whatsoever. The ship was only partly copper-fastened and not what is described in the trade as a copper-fastened vessel. The buyer was entitled to reject or recover damages for the breach of the condition (k).

(h) See Pollock & Mulla, pp. 360-369.
(i) *Vigers Brothers v. Sanderson Brothers* (1901) 1 K. B. 608; *Arco, Ltd. v. E. A. Ranaasen & Son* (1933) A. C. 470.

(j) *Pinnock Brothers v. Lewis & Peat Ltd.* (1923) 1 K. B. 690.
(k) *Shepherd v. Kain* (1821) 5 B. & Ald. 240, 24 R. R. 344.

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(4) Sale of a second-hand reaping machine which the buyer had not seen, stated by the seller to have been new the previous year and to have been used to cut only about 50 acres. The buyer finds when it is delivered to him that it is old and had been mended. The buyer may reject the machine (*l*).

(4a) Sale of "new Singer car". On delivery the buyer finds that it is not a new car. The buyer may reject the car (*m*).

(5) Sale of foreign refined rape oil warranted only equal to samples. The samples contained an admixture of hemp oil and the bulk corresponded with them. The jury negatived an alleged usage in the oil trade that "rape oil" was understood to mean a mixture of rape and hemp oil. The buyers were held entitled to reject the oil (*n*).

(6) Sale by sample of seed described as common English sainfoin, the sellers "giving no warranty express or implied as to growth description or any other matters." Neither the sample nor the bulk was common English sainfoin, but giant sainfoin, as was discovered when the seed had been sown and produced a crop. The buyer may recover damages for the breach of the condition (*o*).

(7) Sale by the defendant of an unstamped bill of exchange, to which the defendant was not a party, supposed to have been drawn in a foreign country and therefore not requiring a stamp. In fact it was drawn in England and in consequence was worthless as a bill of exchange owing to its being unstamped. The buyer recovered the price from the seller (*p*).

Goods must correspond with the description.—As has been stated already, the failure of the seller to supply goods answering the description in the contract is a total failure to perform it, and not merely a breach of one term of it. There has, therefore, never been any doubt that the buyer is entitled to have an article at all events answering the description, even if he has been able to inspect it, and is not bound to accept it or, having accepted it, may claim damages, if it does not. "In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is unnecessary to put any other question to the jury" (*q*). Whether, therefore, the property in goods sold passes to the purchaser or not, he

(*l*) *Varley v. Whipp* (1900) 1 Q. B. 513.

(*m*) *Andrews Brothers, Ltd. v. Singer & Co., Ltd.* (1934) 1 K. B. 17.

(*n*) *Nichol v. Godts* (1854) 10 Ex. 191, 102 R. R. 523.

(*o*) *Wallis v. Pratt* (1911) A. C. 394.

(*p*) *Gompertz v. Bartlett* (1853) 2 E. & B. 849, 95 R. R. 851.

(*q*) *Jones v. Just* (1868) L. R. 3 Q. B. 197, 204.

is entitled to reject the goods if they are not in accordance with the description in the contract, provided that the description forms an actual part of the conditions of the contract and not something collateral to it. "Under the law in this country a man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for" (r). The implied condition under section 16, sub-section (1) is, unless the contract otherwise provides, in addition to the condition in this section. "A man may require goods for a particular purpose and make it known to the seller so as to secure the implied condition of fitness for that purpose: but there is no reason why he should not abandon that purpose if he pleases and apply the goods to any purpose for which the description makes them suitable. If they do not correspond with the description, there seems no business or legal reason why he should not reject them if he finds it convenient so to do" (s).

It is by reason of this fundamental rule that clauses in the contract in favour of the seller cannot be relied on by him if he tenders or delivers goods which are not of the stipulated description. He has failed to perform his contract entirely, and such clauses are construed as implying that the contract has been performed so far as delivering goods of the required description is concerned (t).

Sale by sample.—A sample has reference to the quality of the goods only. A seller may relieve himself from all responsibility as to quality and yet he is bound to supply goods which answer to the description (u), and consequently even if the bulk corresponds with the sample, it will not avail the seller if the goods do not correspond with the description; and, just as in cases where the goods are not sold by sample, a special term in the contract in favour of the seller (such as a clause providing that inferiority in quality of bulk to sample shall be a matter for allowance) does not deprive the buyer of his right to reject the goods if they do not answer the description in the contract, for he did not undertake to accept goods differing in kind from those for which he had bargained (v). Still less will any such provision avail the seller if the bulk does not correspond with the sample at all. Thus in a case of a contract for the sale of cotton guaranteed equal to a sample which was of Longstaple Salem cotton, it was stipulated that "should the quality prove inferior to the guarantee a fair allowance to be made," and the bulk turned out

(r) *Mitchell Reid & Co. v. Buldeo Doss Krettry* (1887) 15 Cal. 1, at p. 5.

(s) *Arcos, Ltd. v. E. A. Ranaasen & Son* (1933) A. C. 470.

(t) See the examples and cf. *Munro & Co. v. Meyer* (1930) 2 K. B. 312

(goods to be taken with all faults and defects at a valuation).

(u) *Josling v. Kingsford* (1863) 13 C. B. (N. S.) 447, 134 R. R. 596.

(v) See the examples and cf. *Mody v. Gregson* (1868) L. R. 4 Ex. 49, at pp. 55, 56, Ex. Ch.

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to be not Longstaple Salem, but exceptionally good Western Madras, which however is inferior to Longstaple Salem and cannot be manufactured with the same machinery, it was held that the buyer was not bound to accept (w).

It is, however, possible that a sample is the only description of the goods, and where this is the case, if the goods correspond with the sample, the condition is fulfilled (x).

Sale of specific goods by description.—It will be observed that the section applies where there is a “contract for the sale of goods by description,” that is to say where the goods are described by the contract. This usually applies to a contract for the sale of unascertained or future goods, but it may apply to the sale of specific goods also, if the buyer contracts in reliance on that description. This may well occur in a case where the buyer has never seen the goods (y) and may also occur where he has seen them (z), but in the latter case it is more difficult for the buyer to show that the sale was a sale by description, for usually the contract for the sale of a specific article is a contract for the article as it is; and descriptions of it at the most amount to a warranty for the breach of which the buyer can only recover damages (a), or, from another point of view, it may be said that the property passes by the contract, and consequently the buyer cannot reject the article by virtue of the provisions of section 15. In any case, the statement made about the article must be essential to its identity, and if it does correspond with the description, the buyer must take it (b). Occasionally where goods are sold over the counter to a customer who asks for the goods, the sale may be a sale by description (c), but some limit must be placed on this, otherwise the only sale which would in general be possible would be a sale by description; and in ordinary parlance, a customer who buys goods in a shop across the counter is buying specific goods.

“It is settled law that the only sales not by description are sales of specific goods as such. Specific goods may be sold as such when they are sold without any description, express or implied; or where any statement made about them is not essential to their identity; or where,

(w) *Azémar v. Casella* (1867) L. R. 2 C. P. 431. Affirmed, *ib.* 677; *Champanhae & Co. v. Waller & Co.* (1948) 2 All. E. R. 724 (a sale by sample and a sample by description were in *pari materia*).

(x) *Mody v. Gregson*, *supra*, at pp. 53, 54; *Carter v. Crick* (1859) 4 H. & N. 412, 118 R. R. 521.

(y) *Varley v. Whipp* (1900) 1 Q. B. 513, example (4).

(z) *Thornett & Fehr v. Beers & Son* (1919) 1 K. B. 486, per Bray, J.; of

Medway Oil & Storage Co. Ltd. v. Silica Gel Corporation (1928) 33 Com. Cas. 195, H. 22.

(a) *Parsons v. Sexton* (1847) 4 C. B. 899, 49 R. R. 822 (sale of an engine, described as a “fourteen horse power engine,” which had been inspected by the buyer’s agent).

(b) *Barr v. Gibson* (1838) 3 M. & W. 390, 49 R. R. 650.

(c) *Wren v. Holt* (1903) 1 K. B. 610, C. A.; *Morelli v. Fitch & Gibbons* (1928) 2 K. B. 636.

though the goods are described, the description is not relied upon, as where the buyer buys the goods such as they are" (d).

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Whether statements with reference to the goods amount to a description of them must depend upon the terms of the contract, but they will usually in mercantile contracts amount to a part of the description (e).

Conditions as to quality.—This section, it will be observed, deals only with the condition that the goods should correspond with the description. In the older cases stipulations, express or implied, as to the quality of the goods were treated as part of their description: the Act, however, deals with them as separate conditions in section 16 (2) and section 17.

Sale of stocks and shares.—The English Act does not apply to the sale of stocks and shares and like things, but the general principles relating to the sale of goods govern such transactions and in India, by virtue of the definition of "goods", the provisions of this section will, it seems, be applicable to them. The broad rule in England appears to be that where the thing dealt with is something essentially different from what it is supposed to be, for instance, a forgery (f) or something unmarketable because it is not properly stamped (g), the sale can be rescinded by the buyer and he can recover the purchase price. It can be fairly said, it would seem, that in such cases the thing sold does not answer the contractual description within the meaning of the section, though in England the cases have been treated as falling under the head of common mistake (h). But there must be a complete difference in substance

(d) *Joseph Travers v. Longel* (1948) 64 T. L. R. 150.

(e) See *Benabu v. Produce Brokers Ltd.* (1921) 37 T. L. R. 851, C. A. (goods bought afloat); *Ballantine & Co. v. Cramp and Bosman* (1923) 129 I. T. 502 (weight); *Barker (Junior) & Co. v. Agius, Ltd.* (1927) 33 Com. Cas. 120, 43 T. L. R. 751 (briquettes of a certain size); *Moore & Co. v. Landauer & Co.* (1921) 2 K. B. 519, C. A. (mode of packing); *Dayton Price & Co., Ltd. v. Rohomotollah* (1925) 29 Cal. W. N. 422, 86 I. C. 571, ('25) A. C. 609 (plate of shipment); *Parthasarathy Chetty & Co. v. T. M. Gajapathy Naidu & Co.* (1925) 48 Mad. 787, 91 I. C. 568, ('25) A. M. 1258 (design); *Re Andrew Yule & Co.* (1932) 59 Cal. 928, 140 I. C. 877, ('32) A. C. 879 ("Standard Mills Make"); contrast *Sazuki & Co. v. Uttamchand Maneklal* (1926) 50 Bom. 318, 96 I. C. 313, ('26) A. B. 431 (imported goods need not be imported by seller direct); *Ramjiwan v. Bhikaji* (1924) 48 Bom.

519, 80 I. C. 381, ('24) A. P. C. 143 (numbers on bales).

(f) *Jones v. Ryde* (1814) 5 Taunt. 488, 15 R. R. 561 (forged naval bill); *Gurney v. Womersley* (1854) 4 E. & B. 133, 99 R. R. 390 (bill of exchange bearing a forged endorsement).

(g) *Gompertz v. Bartlett* (1853) 2 E. & B. 849, 95 R. R. 851, example (7); *Young v. Cole* (1837) 3 Bing. N. C. 724, 43 R. R. 783 (sale of Guatemala bonds, unstamped and therefore not recognized by the Guatemala State); *Westropp v. Solomon* (1849) 8 C. B. 345, 79 R. R. 530 (unstamped scrip). Analogous to such cases are the sale of a life insurance policy or an annuity when, unknown to the parties, the insured or annuitant is dead; *Scott v. Coulson* (1903) 2 Ch. 249, C. A.; *Strickland v. Turner* (1852) 7 Ex. 208.

(h) See *Bell v. Lever Brothers* (1932) A. C. 161, where the whole subject is exhaustively discussed.

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between the thing bargained for and the thing obtained, the mere fact that it is something less valuable than it was supposed to be will not make it something different so that it can be said not to answer the description. In such a case the buyer must go further, if he desires to rescind the contract and recover the price, and prove misrepresentation (i), though perhaps it is not now necessary for him to prove that the misrepresentation was fraudulent (j).

16. Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose :

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality :

Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

(i) *Kennedy v. Panama Royal Mail Co.* (1867) L. R. 2 Q. B. 580. (j) See per Scrutton, L.J., *Lever Brothers, Ltd. v. Bell* (1931) 1 K. B., at p. 588.

Examples.—The section may be illustrated by the following examples :—

Caveat emptor.—(1) The defendant, a farmer, bought the carcass of a pig from a butcher in the market intending to use it for his own consumption and left it in the butcher's stall. The plaintiff later saw the carcass there and wishing to buy it was referred to the defendant who sold it to him. The plaintiff bought it for consumption for food, but the carcass was diseased and unfit to eat. In an action brought by the plaintiff against the defendant it was held that there was no implied condition or warranty that the carcass was fit for human consumption (k).

(2) Sale of pigs "with all faults" in a market. The pigs were suffering from typhoid fever and infected other pigs belonging to the buyer. In the absence of fraud on the part of the seller the buyer was without remedy (l).

(3) Sale by sample by a woollen manufacturer of indigo cloth to a woollen merchant who was also a tailor. The buyer required it for the purpose of making it into liveries, but this was not made known to the seller in any way. Owing to a latent defect in the cloth (which was also in the sample) it was unfit for that purpose, but there was nothing to show that it was unfit for other purposes for which cloth of that kind might be used. The buyer was without remedy (m).

Proviso to sub-section (1).—(4) Order to a patentee of a smoke-consuming furnace for "your patent hopper and apparatus to fit up my brewing copper with your smoke-consuming furnace". The furnace proved useless for the purpose of a brewery. The buyer was without remedy (n).

Sub-section (1).—(5) Sale by a grocer and provision merchant of tinned salmon. The buyer was made ill by the salmon, which was poisonous, and his wife who also ate it died from the effects of the poison. The buyer recovered damages, including a sum to compensate him for being compelled to hire some one to perform the services which had been rendered by his wife (o).

(6) Sale of copper for the purpose, known to the seller, of sheathing a ship. Owing to a latent defect the copper perished in a few months and was in fact unfit for the purpose of sheathing a ship. The buyer was entitled to recover damages (p).

(k) *Burnby v. Bollett* (1847) 16 M. & W. 644, 73 R. R. 667.

(l) *Goddard v. Hobbs* (1878) 4 App. Cas. 13.

(m) *Jones v. Padgett* (1890) 24 Q. B. D. 650, cf. *In re Andrew Yule & Co.* (1932) 59 Cal. 928.

(n) *Chanter v. Hopkins* (1838) 4 M. & W. 399, 51 R. R. 650.

(o) *Jackson v. Watson & Sons* (1909) 2 K. B. 193, C. A.

(p) *Jones v. Bright* (1829) 5 Bing. 533. (The action was framed in case for deceit but all fraud was negatived by the jury. At the present day it would be framed in contract for breach of the implied condition under sub-section (1).)

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(6a) Sale of boiler for the purpose, known to the seller, of manufacturing carbon paper. The boiler did not satisfy the requirements of the Indian Boilers Act. The plaintiff was entitled to recover damages (q).

(7) Order for 500 tons South Wales coal for the steamship 'Manchester Importer' at Partington. The buyer knew when he gave the order that the seller's sources of supply were limited and might be procurable from the cargo of one particular vessel only. The order was accepted but the coal supplied, which came from the cargo of that vessel, was unsuitable for burning in the 'Manchester Importer', which had natural draught furnaces, with the result that she had to abandon her voyage and return to port. The buyer recovered damages (r).

(7a) A contracts to make and deliver a set of false teeth to B. The false teeth do not fit in the mouth of B. B is entitled to reject the goods (s).

Sub-section (2).—(8) Sale of Manilla hemp to arrive from Singapore by certain ships. The hemp when shipped by the seller had been damaged without his knowledge by seawater so as not to be merchantable, but not so as to make it lose its character as hemp. The buyer was held entitled to recover the difference between what it fetched on being resold with all faults and what it would have been worth if it had been shipped in proper condition (t).

(9) Sale of a quantity of motor-horns by instalments. The first instalment was accepted, but the second contained a substantial portion of horns which owing to bad packing were dented, while others were owing to careless workmanship badly polished, and by reason of these defects they were not saleable. The buyer was held entitled to reject the whole instalment (u).

Proviso to sub-section (2).—(10) Sale of a quantity of vegetable glue in casks. The buyer came to examine the glue, but contented himself with looking at the outside of the casks. The glue was unmerchantable by reason of a defect which the buyer would have discovered if he had examined the glue properly. The buyer was without remedy (v).

Sub-section (3).—(11) Sale of drugs by auction. It was a trade usage to declare any sea damage in such cases. It was held that this had the effect of creating a warranty that drugs so sold without any such declaration were free from sea damage (w).

Sub-section (4).—(12) Sale of a motor-car for the purpose, known to the seller, of being used as a touring car. The car was guaranteed by the

(q) *Joseph Mayr v. Phani Bhusan* (1938) 2 Cal. 88, 182 I. C. 397, ('39) A. C. 210.

(r) *Manchester Liners, Limited v. Rea, Limited* (1922) 2 A. C. 74.

(s) *Baretto v. Pruce* ('39) A. N. 19.

(t) *Jones v. Just* (1868) L. R. 3

Q. B. 197.

(u) *Jackson v. Rotax Motor & Cycle Co., Ltd.* (1910) 2 K. B. 937, C. A.

(v) *Thornett & Fehr v. Beers & Son* (1919) 1 K. B. 486.

(w) *Jones v. Bowden* (1813) 4 Taunt. 847, 14 R. R. 683.

seller against any breakage of parts due to faulty material and was sold subject to the condition that that guarantee was accepted instead of and expressly excluded any other guarantee or warranty, statutory or otherwise. The car was not reasonably fit for use as a touring car. The buyer was held entitled to reject it (x).

Caveat emptor.—This section is based upon section 14 of the English Act, the drafting of which caused considerable difficulty (y). It starts by laying down the principle that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality which he requires or, if he is buying them for a specific purpose, that they are fit for that purpose. This principle is summed up in the maxim "caveat emptor;" and it is based upon the presumption that the buyer is relying on his own skill and judgment, when he effects a purchase.

The rule at common law.—The rule probably originated at a time when goods were mostly sold in market overt, and the buyer therefore had every opportunity to satisfy himself as to the quality of the goods or their fitness for a particular purpose, and at common law it was presumed that where the buyer could examine the goods, even though he did not, he relied upon his own skill and judgment. Hence the rule was that in the case of the sale of goods, "which are *in esse* and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer. The buyer in such a case has the opportunity of exercising his judgment upon the matter, and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable" (z).

(x) *Baldry v. Marshall* (1925) 1 K. B. 260, C. A.; *Horn v. Minister of Food* (1948) 2 All. E. R. 1036.

(y) Chalmers, p. 50.

(z) *Jones v. Just* (1868) L. R. 3 Q. B. 197, at p. 202, citing *Parkinson v. Lee* (1802) 2 East. 314, 6 R. R. 429 and *Emmerton v. Mathews* (1862) 7 H. & N. 586, 126 R. R. 567. The former is a much discussed case, and in 1877 Lord Esher, M. R. (then Brett, J. A.) said of it "either it does not determine the extent of a seller's liability on the contract, or it has been overruled." (*Randall v. Newson* (1877) 2 Q. B. D. 102, at p. 106). But later in the year in which *Jones v. Just* was decided a very strong Court approved it, on the ground that the sale was of specific goods (they were hops, a commodity liable to many accidents and frauds) and "the sample

was sound and the bulk answered the sample at the time of the sale, . . . the sample was fair; the bulk purchased was ascertained and existing; it did, at the time the bargain was made and the property passed, in fact answer the description in the contract and was the very thing bargained for, and the secret defect which afterwards developed itself, and made the bulk unmerchantable, was not known to the seller nor caused by any act of his." (*Mody v. Gregson* (1868) L. R. 4 Ex. 49, 55; Judgment of the Exchequer Chamber delivered by Willes, J.). The second case might on the facts be decided in the same way to-day, on the ground that the plaintiff was not as a matter of fact relying on the skill and judgment of the defendant, who was merely a salesman, but on his own.

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Similarly "where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty" at common law (a). And "where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer" (b).

At common law, therefore, where the goods were in existence at the time of the contract, and the buyer had the opportunity of inspecting them, whether the contract was for specific or unascertained goods, for instance a part of a larger parcel, or were specific goods the actual condition of which was equally capable of being ascertained by the buyer as by the seller, or were a known article, specifically described by the buyer, the buyer was presumed to be acting on his own judgment; and could not afterwards hold the seller responsible on the ground that the article turned out to be unfit for the purpose for which it was required or not to be of merchantable quality; nor did it affect the case if the buyer did not avail himself of the opportunity to examine the goods, or if the goods had some latent defect, which is generally understood to mean a defect such that no practicable examination made with competent skill and care would discover it (c).

Exceptions to the rule at common law.—At common law, however, there were recognized exceptions to the rule of *caveat emptor*. First, "where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the

(a) *Jones v. Just*, *supra*, at p. 202, citing *Barr v. Gibson* (1838) 3 M. & W. 390, 49 R. R. 650, which shows that the words "capable of being ascertained by either party" do not mean that ascertainment is easy, but that it is not easier for one party than the other; for in *Burr v. Gibson* the ship, which formed the subject-matter of the contract of sale—long before the days of ocean cables—was stranded on an island in the gulf of St. Lawrence. The ship, however, was in itself capable of repair, and not a mere wreck, though much damaged, and in the circumstances not capable of being made navigable, and was therefore still a ship and was effectually sold and transferred as such between parties ignorant of her condition.

(b) *Jones v. Just* (1868) L. R. 3 Q. B. 197, at p. 202, citing *Chanter v. Hopkins* (1838) 4 M. & W. 399, 51 R. R. 650, example (4) and *Ollivant v. Bayley* (1843)

5 Q. B. 288, 64 R. R. 501, which follows the former case and adds nothing to it.

(c) *Redhead v. Midland Ry. Co.* (1867) L. R. 2 Q. B. 412, 4 Q. B. 379, *passim*; *Jatindra Chandra Banerjee v. Muralidhar* (1926) 43 Cal. L. J. 126, 94 I. C. 873, ('26) A. C. 749. The framers of the Indian Contract Act appear to have acted on this view of the law, for by s. 116 it was provided that "In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it." It will be borne in mind that the discussion has reference solely to questions of *quality*, in which term may be included fitness for a particular purpose, and has no reference to cases where the goods are not of the stipulated description. The defects may be of such a kind as to prevent the goods answering the description. See pp. 82-84 *ante*.

manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own" (d). And *secondly* "where a manufacturer undertakes to supply goods, manufactured by himself or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article" (e); and generally "in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description" (f). And, even at common law, when it is a term of the contract that the seller should supply an article reasonably fit for the purpose for which it is required or of merchantable quality, the fact that the article is rendered unfit or unmerchantable by reason of some latent defect is no excuse to the seller. His duty on this point is absolute. It does not depend on any question of negligence, nor is it limited to making good such defects as are discoverable by care and skill (g).

It is a breach of this condition to supply provisions to a wholesale dealer, which though not actually unwholesome, contain adventitious matter producing effects which alarm the consumer, and thereby render the food or drink unmarketable. A firm of distillers agreed to furnish African merchants with whisky coloured to resemble rum. Burnt sugar ought to have been used for this not very laudable, but, as between the parties, legally innocent purpose. In fact, log-wood was used, and the whisky coloured with it "proved unsaleable," the natives, not

(d) *Jones v. Just* (1868) L. R. 3 Q. B. 197, pp. 202-3, citing *Brown v. Edgington* (1841) 2 Man. & G. 279, 58 R. R. 408; *Jones v. Bright*, *supra*, example (6); *Spencer Trading Co. Ltd. v. Devon (Fisol and Stickphast Ltd., Third Parties)* (1947) 1 All. E. R. 284.

(e) *Jones v. Just*, p. 203, citing *Laing v. Fidgeon* (1815) 4 Camp. 169, 6 Taunt. 108, 16 R. R. 589; *Shepherd v. Pybus* (1842) 3 Man. & G. 868, where the buyer had inspected the barge, the subject-matter of the contract, after it had been completed, but not during its construction.

(f) *Jones v. Just*, *supra*, p. 205, citing *Bigge v. Parkinson* (1862) 7 H. & N. 955, 126 R. R. 783; *Gardiner v. Gray* (1815) 4 Camp. 144, 16 R. R. 764, in which occurs Lord Ellenborough's famous ruling. "Under such circumstances the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular

warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill." The English law has been followed by the Courts in India; *Peer Mahomed v. Dalooram* (1918) 35 Mad. L. J. 180 (sale of black yarn Hanuman marked. The goods when shipped by the seller had been damaged by white ants). See also *Malli & Co. v. R. V. A. A. Firm* (1922) 43 Mad. L. J. 208, 69 I. C. 396, (23) A. M. 252.

(g) *Randall v. Newson* (1877) 2 Q. B. D. 102, C. A. As to the liability of the seller in tort, see appendix IV.

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unreasonably, fancying it to be poisoned, some of them who tried it having found that it dyed their saliva and other secretions into the colour of blood. The House of Lords held on appeal from the Court of Pleas in Scotland, that the distillers were liable in damages to the merchants (*h*). The only substantial defence was in effect to narrow the issue by reference to the language of the contract ; this is now of no interest.

The Court of Appeal in England has held by a majority that in the case of a sale of goods by a maker of such goods, who does not otherwise deal in them, there is, in the absence of an agreement or custom of trade to the contrary, a warranty that the goods supplied shall be of his own make (*i*).

Exceptions to the rule under the Act. The first exception.—Sub-section (1) of this section embodies the first of the common law exceptions to the rule of *caveat emptor*, but, in addition, introduces certain further modifications of that rule in favour of the buyer. It applies alike to the sale of specific (*j*) and unascertained goods ; and makes no distinction between cases where the goods are *in esse* and where they are not, so that it is immaterial whether the buyer has, or has not, the opportunity of inspecting them or whether or not he avails himself of that opportunity if he has it. In short, the question is under the section merely a question of fact whether the buyer did rely on the skill or judgment of the seller, and no presumption is raised against him by reason of the fact that the goods were *in esse* and he had the opportunity of examining them (*k*). Nor is it necessary that he should rely on the seller's skill or judgment to the exclusion of any reliance on anything else (*l*) ; and in the absence of a finding by the jury that the buyer did not rely on the seller's skill and judgment, this sub-section can be applied in many cases where under the common law the case would have been decided in favour of the seller. The description of the goods required, as given by the buyer, may point to the fact that they are required for a particular purpose, and in such a case it may be a fair inference that the goods are being ordered for that particular purpose. Where, for example, the plaintiff, who was a draper, and had no special skill or knowledge with regard to hot-water-bottles, went to a chemist who sold such articles, and asked for a "hot-water-bottle," it was

(*h*) *Macfarlane v. Taylor* (1868) L. R. 1 H. L. Sc. 245.

(*i*) *Johnson v. Rayton* (1881) 7 Q. B. D. 438, Bramwell, L. J., dissented. The rule is not embodied in either this or the English Act. See Chalmers, p. 50.

(*j*) See *Wallis v. Russell* (1902) 2 I. R. 585, C. A., where this section is fully discussed ; *Preist v. Last* (1903) 2 K. B. 148, C. A. ; *Harnarain Ramchandra Jaiswal v. Firm Radhakisan Narayandas*

(1899) A. N. 178.

(*k*) Compare, for instance, *Cointat v. Myham & Son* (1913) 2 K. B. 220, with *Emmerton v. Mathews* (1862) 7 H. & N. 586, 126 R. R. 527. Note (*z*), *supra*.

(*l*) *Medway Oil & Storage Co., Ltd. v. Silica Gel Corporation* (1928) 33 Com. Cas. 195, H. L. ; *Cammell Laird & Co., Ltd. v. The Manganese Bronze & Brass Co., Ltd.* (1934) A. C. 402.

held that the Court might justly infer that the goods were bought and sold for the purpose of being used as a hot-water-bottle (*m*). A retail dealer in woollen goods who sells underpants must know that they are required for the particular purpose of being worn next the skin (*n*). So in a sale of milk the jury may reasonably infer that the milk was ordered for the purpose of being consumed as food (*o*), and as regards the sale of provisions generally by one whose business it is to supply them, the practical effect of the sub-section is to bring back the law to Blackstone's opinion that "in contracts for provisions it is always implied that they are wholesome and, if they be not, the same remedy (an action for damages then regarded as an action in tort for deceit) may be had" (*p*), for apart from very exceptional cases it will be readily inferred that the buyer relied upon the seller's skill and judgment, and the fact that the provisions sold were rendered unwholesome by reason of some latent defect, not to be guarded against by any skill, will not avail the seller (*q*). The fact, therefore, that section 111 of the Indian Contract Act, which provided that "on the sale of provisions there is an implied warranty that they are sound," is not re-enacted is of little practical importance (*r*).

The fact that the buyer knows of difficulties about fulfilling his requirements, by reason of the seller's available stock being limited or otherwise, is not of itself enough to displace the implication of the sub-section, when the purpose for which the goods are wanted is expressly disclosed to the seller (*s*).

But "there are many goods which have in themselves no special or peculiar efficacy for any one particular purpose, but are capable of general use for a multitude of purposes. In the case of a purchase of goods of that kind, in order to give rise to the implication of a warranty it is necessary to show that, though the article sold was capable of general use for many purposes, in the particular case it was sold with reference to a particular purpose" (*t*) and if this is not shown the buyer

(*m*) *Preist v. Last* (1903) 2 K. B. 148, C. A. Compare *Bennett, Ltd. v. Kreeger* (1925) 41 T. L. R. 609 (coat with fur collar); *Thompson v. Sears* (1926) Sc. L. T. 221 (walking boots for the buyer's own use).

(*n*) *Grant v. Australian Knitting Mills Ltd.* (1936) 70 M. L. J. 513, 159 I. C. 667, (1936) A. C. 85, ('36) A. P. C. 34.

(*o*) *Frost v. Aylesbury Dairy Co.* (1905) 1 K. B. 608, C. A.; *Jackson v. Watson*, *supra*, example (5).

(*p*) Comm. III, 166.

(*q*) *Frost v. Aylesbury Dairy Co.*, *supra*, at pp. 612-3; *Lockett v. Charles, Ltd.* (1938) 4 A. E. R. 170.

(*r*) Maize was held to fall within the

category of provisions in *Bansi Lal-Ram Rattan v. Ram Chand-Tola Ram* (1930) 127 I. C. 353, ('30) A. L. 843. That case would fall within sub-section (2) of this section if the contract were made today.

(*s*) *Manchester Liners v. Rea*, *supra*, example (7). Here it was argued that s. 14, the corresponding section in the English Act, had narrowed the common law rule; but the House of Lords declared that it had not.

(*t*) *Preist v. Last* (1903) 2 K. B., at p. 153, per Collins, M. R., *Bombay-Burmah Corporation v. Aga Mahomed* (1911) 38 I. A. 169, 34 Mad. 453, 12 I. C. 44; *In re Andrew Yule & Co.* (1932) 59 Cal. 928, 140 I. C. 877, ('32) A. C. 879.

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will have no remedy merely because it was unfit for the particular purpose (*u*).

It is to be observed that the condition will not be implied if the goods are not of a description which it is in the course of the seller's business to supply, though it is not necessary that he should be the manufacturer or producer of them (*v*), and, even where the goods are of that description, it is necessary that the purpose for which they are bought should be made known to the seller in such circumstances as to show that the buyer relies on his skill and judgment (*w*).

Sale of an article under its patent or trade name.—The effect of the proviso to sub-section (1) is to continue the common law rule of *caveat emptor* in the case of the sale of an article under its patent or other trade name. As already seen, this is but an instance of a case which raises the presumption that the buyer does not rely on the skill and judgment of the seller, but on his own, for the bargain is "for the purchase of a specific chattel, which the buyer himself describes believing indeed that it will answer a particular purpose to which he means to put it"; and consequently "if it does not, he is not the less on that account bound to pay for it" (*x*). Accordingly the proviso does not cover the case of an executory contract for the supply in bulk of manufactured goods, such as coal, though the terms of the contract may require them to be of a description known in the trade (*y*). If it did, a cotton manufacturer, who bought cotton by such a description as "Fair Bengal" for the purpose, known to the seller, of making it into such yarn as is usually made of that kind of cotton, would have no remedy in the case of its proving useless, unless he had taken an express warranty.

Trade name.—A "trade name," moreover, has to be acquired by user, and whether it has or has not been so acquired, is a question of fact in each case (*z*). "It is one thing," for instance, "to order an article known as a 'Fiat omnibus,' an order which is intelligible only if there be such an

(*u*) *Jones v. Padgett*, *supra*, example (3).

(*v*) The case of *Burnby v. Bollett*, *supra*, example (1), therefore is still good law, for the defendant was not a dealer in meat, and moreover the plaintiff did not rely on his skill and judgment.

(*w*) For a case where this was negatived as a fact, see *Wren v. Holt* (1903) 1 K. B. 610, C. A. In a case in which the buyer of a second-hand motor car made known to the seller that he was buying it to run for hire, it was held by Pratt, J., under s. 114, of the Indian Contract Act that there was an implied warranty that it was fit for the purpose for which it was

bought. The learned Judge, however, went on to say that it was immaterial for the purposes of that section whether the buyer relied on his own judgment or the seller's; *Amies v. Jal* (1923) 25 Bom. L. R. 778, 782, 77 I. C. 150, (24) A. B. 41. It is, with great respect, doubtful whether this view was right even under the Indian Contract Act; and it is clearly untenable under this section, or at common law.

(*x*) *Chanter v. Hopkins*, *supra*, example (4).

(*y*) *Gillespie Brothers & Co. v. Cheney Eggar & Co.* (1896) 2 Q. B. 59.

(*z*) *Bristol Tramways Co. v. Fiat Motors* (1910) 2 K. B. 831, C. A., at p. 840.

article known to the public or the trade ; it is quite another thing to order an omnibus to be made by the Fiat Company, although in the latter case that company might adopt patterns and devices which were its own exclusive property ; the former is within the proviso ; the latter is not. An omnibus made by the Fiat Company may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name within the Act. If it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name " (a). And it does not necessarily follow that, because the contract is for the sale of a specific article under its patent or other trade name, even when that name has been acquired by user, there is no implied condition as to its fitness for any particular purpose. For although a person may order an article under a patent or trade name within the meaning of the proviso, yet if at the same time that the order is given he makes it clear to the seller that he is relying on the seller's skill and judgment to insure that the article shall be fit for the particular purpose, the proviso has no application, and the buyer is entitled to the benefit of the provisions of sub-section (1) (b). " The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name. Whether it is so or not depends upon the circumstances. I may illustrate my meaning by reference to three different cases. First, where a buyer asks a seller for an article which will fulfil some particular purpose, and in answer to that request the seller sells him an article by a well-known trade name, there, it is clear that the proviso does not apply. Secondly, where the buyer says to the seller ' I have been recommended such and such an article '—mentioning it by its trade name—' Will it suit my particular purpose ? ' naming the purpose, and thereupon the seller sells it without more, there again the proviso has no application. But there is a third case, where the buyer says to a seller, ' I have been recommended so and so '—giving its trade name—' as suitable for the particular purpose for which I want it. Please sell it to me.' In that case it is equally clear that the proviso would apply and that the implied condition of the thing's fitness for the purpose named would not arise.... The test of an article having been sold under its trade name within the meaning of the proviso is : Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however great that skill or judgment may be ? " (c).

The second exception.—Sub-section (2) embodies the second exception recognized at common law to the maxim *caveat emptor*, but

(a) *Ibid.*, at pp. 839-40, per Farwell, L. J. (12), at p. 270, per Sargant, L. J.
 (b) *Baldry v. Marshall*, *supra*, example (c) *Baldry v. Marshall*, *supra*, at pp. 266-7, per Bankes, L. J.

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again introduces important modifications in favour of the buyer; for whereas at common law the implication of a condition that the goods were of merchantable quality did not arise if the buyer had an opportunity to examine the goods, under this section it will only be negatived if the buyer has actually examined the goods. Further, while it was at least doubtful whether the seller was, at common law, liable for latent defects which rendered the goods unmerchantable in those cases where the buyer had the opportunity of examining the goods, under the Act the seller is so liable, even if the goods are examined by the buyer. The rule therefore now is, in the case of goods sold by description by a seller who deals in such goods, that he is always, in the absence of agreement to the contrary, responsible for latent defects in the goods which render them unmerchantable, whether the buyer has examined them or not, and for all such defects whether latent or discoverable on examination in cases where the buyer has not in fact examined the goods. If, however, the buyer having the opportunity of inspection is content to examine the goods superficially, he will not be entitled to complain of defects which he would have discovered if his examination had been more thorough (*d*). It is to be observed, also, that the implied condition applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise, and the proviso to the first sub-section does not apply to this sub-section (*e*).

The question whether a particular sale of goods was under a patent or trade name or by description is a question of fact (*f*).

Merchantable quality.—There is no definition of the phrase, “merchantable quality” in the Act, and, no doubt, it seems “more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products such as grain, wool or flour, than to a complicated machine, but it is clear that it extends to both. The definition of ‘goods’ makes that word include all chattels personal (other than things in action, and money), and ‘quality of goods’ includes their state or condition. . . . The phrase in this section is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man, acting reasonably, would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article, whether he buys for his own use or to sell again” (*g*).

(*d*) *Thornett & Fehr v. Beers & Son*, *supra*, example (10).

(*e*) *Bristol Tramways Co. v. Fiat Motors, Ltd.* (1910) 2 K. B. 831, C. A.; *McKenzie & Co. v. Nagenra Nath*, 50 C. W. N. 213.

(*f*) *Chhedilal v. Brit-over Ltd.*, 52 C. W. N. 45.

(*g*) *Bristol Tramways Co. v. Fiat Motors, Ltd.*, *supra*, at pp. 840-1, per Farwell, L. J. The definition does not quite cover the case of goods being rendered unmerchantable by reason of some

latent defect which could not be disclosed by any practicable examination, but is made apparent when the goods come to be used; but with this exception it would appear to be sufficiently exhaustive. The wider definition of “goods” in this Act does not appear to be of any material importance in this connexion, cf. *Malli v. R. V. A. A. Firm* (1922) 43 Mad. L. J. 208, 69 I. C. 396, (‘23) A.M. 252; *Peer Mahomed v. Dalooram* (1918) 35 Mad. L. J. 180.

This does not, however, mean that the buyer is entitled to treat the goods as unmerchantable merely because they are not fit for some particular purpose; for if goods are sold under a description which they fulfil and if goods under that description are reasonably capable in ordinary use for several purposes, they are of merchantable quality within the meaning of the sub-section if they are reasonably capable of being used for any one or more of such purposes, even if unfit for that one of those purposes which the particular buyer intended (h). Consequently where barley, sold under the description of feeding barley, was found to be useless as food for pigs, owing to its having been attacked by a fungus, but was still capable of being used as feeding stuff for other animals, it was held that it was not unmerchantable (i). Nor is there any implied condition under this sub-section that the goods shall be legally saleable in the market of their destination, even though that destination is known to the seller. The condition is that the goods shall be of merchantable *quality*, that is, that they shall not differ from the normal quality of the described goods (including, under the term "quality", their state or condition as required by the contract), to such an extent as to make them unsaleable; it does not mean that there can legally be buyers of the article (j). On the other hand, if the goods are in such a state or condition that they cannot be sold in that state or condition, they are not of merchantable quality, even if they can be put into a proper state and condition at a small expense (subject to the rule *de minimis non curat lex*). Thus in the case of *Jackson v. Rotax Motor & Cycle Co.* (k), it would have cost but little to repair the dents, and to polish the horns properly. Nevertheless it was held that the buyer was not bound to incur this small expense, but was entitled to reject the whole consignment.

Specific goods.—It has already been seen that specific goods may be sold by description (l), and when this is the case the sub-section will apply. Thus, the plaintiff entered a public-house, licensed for the sale of beer to be consumed on the premises, knowing that all the beer sold at that house

(h) *Canada Atlantic Grain Export Co. v. Eilers* (1929) 35 Com. Cas. 90, at p. 102; *In re Andrew Yule & Co.* (1932) 59 Cal. 928, 140 I. C. 877, ('32) A. C. 879.

(i) *Ibid.* So too in the case of *Jones v. Padgett*, *supra*, example (3), as the cloth was fit for use for some of the purposes for which cloth of that description was used it was held that it was merchantable, though it was not fit for the particular purpose for which the buyer intended to use it.

(j) *Sumner Permain & Co. v. Webb & Co.* (1922) 1 K. B. 55, C. A. The goods in that case were bottled tonic

water sold under the description of Webb's Indian Tonic, f.o.b. London for shipment to the Argentine. The water contained a percentage of salicylic acid, which was prohibited as an ingredient in food by the law of the Argentine, so that the consignment was condemned by the authorities on arrival there. The Court declined to draw the inference of fact that the buyers relied on the seller's skill and judgment for the assumption that the sale of the water was not prohibited by the law of that country, so no question arose under sub-section (1).

(k) *Supra*, example (9).

(l) Notes to s. 15, p. 70 *ante*.

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was supplied from *H*'s brewery and with the object of getting *H*'s beer because he preferred it. He was afterwards seized with illness, and the jury found that the illness was to a large extent due to arsenical poisoning caused by arsenic present in the beer, and that he had contributed to the poisoning by excessive drinking. They further found that the plaintiff did not rely for the good quality of his beer on the skill or judgment of the defendant, the licensee, and that the plaintiff had sustained damage to the amount of £50. The Court of Appeal held that judgment had been rightly entered for the plaintiff, on the ground that he had bought goods from a seller who dealt in goods of that description, and that there was an implied condition that they should be of merchantable quality (*m*). Similarly, the plaintiff had his hair dyed by the defendant at his hair-dressing establishment with a product which was recommended by the defendant as a good hair dye and in consequence contracted dermatitis. It was found that the dermatitis was contracted as a direct result of the use of the hair dye on the head, and the defendant was held liable in damages (*n*). In another case, however, the plaintiff purchased from the defendant, a retail trader, a Harris tweed coat, and shortly after she began to wear the coat she contracted dermatitis. It was, however, found that the plaintiff's skin was abnormally sensitive and there was nothing in the cloth which would have affected the skin of a normal person. It was held that the sub-section did not apply in such a case as no seller could assume that a buyer was allergic in respect of any particular goods (*o*). Otherwise the sub-section does not apply to the sale of specific goods.

Terms annexed by usage.—Sub-section (3) is founded on *Jones v. Bowden* (*p*).

Trade usage may, on the other hand, have the effect of dispensing with what would otherwise be part of the obligation of a contract, or of reducing a condition to a warranty. But any such usage must, of course, be proved if it is relied upon, and it must be certain and uniform (*q*) and reasonable. "If the custom went the length of saying that there should be no remedy for any variation in the quality contracted for, it would of

(*m*) *Wren v. Holt* (1903) 1 K. B. 610. Compare *Morells v. Fitch & Gibbons* (1928) 2 K. B. 636 (sale of mineral water in a defective bottle). This case and the case of *Gedding v. Marsh* (1920) 1 K. B. 668, show that the conditions under sub-sections (1) & (2), apply not only to the goods sold, but also to goods that are essentially necessary to the delivery and use of the goods sold, as being "supplied under the contract of sale." See *Daniels & Daniels v.*

White & Sons, Ltd. & Tarbard (1938) 4 A. E. R. 258 (sale of a bottle of lemonade which was poisonous).

(*n*) *Watson v. Buckley, Osborne, Garrett & Co., Ltd.* (1940) 1 A. E. R. 174; *Parker v. Olozo, Ltd.* (1937) 3 A. E. R. 524.

(*o*) *Griffiths v. Peter Conway, Ltd.* (1939) 1 A. E. R. 685.

(*p*) *Supra*, example (11).

(*q*) *Wood v. Wood* (1823) 1 C. & P. 59.

course be unreasonable, for it would absolutely alter the nature of the contract " (r).

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An importing firm which accepts a commission to order out goods from Europe at a specified rate, and undertakes that the goods will be invoiced to the indenter at that rate, does not, in the absence of proof of usage to the contrary, fulfil its contract by offering to the indenter goods procured in Bombay from another firm in Bombay, though they answer the description of the goods in the order (s). The actual decision has in itself nothing to do with warranty, but only illustrates the general rule that all express terms of a contract are presumed to be material. It is not clear from the report why the Court thought any question of importance was involved; but the arguments, as is too common in Indian reports, are wholly omitted.

Express terms do not necessarily displace implied terms.—Sub-section (4) is in accordance with the general rule of construction; "The doctrine that an express provision excludes implication (*expressum facit cessare tacitum*) does not affect cases in which the express provision appears, upon the true construction of the contract, to have been super-added for the benefit of the buyer; as in *Bigge v. Parkinson* (t) where a warranty that the provisions sold should pass the inspection of the East India Company, was held not to exclude the implied warranty of merchantableness" (u). An express term, however, will not be extended by implication (v) and if it be inconsistent with a term implied by law it will prevail, and the term usually implied will be negatived. In the Trans-Atlantic Corn trade, for instance, it is commonly a term of the contract that the certificate of the official samplers appointed by the American Government that the corn sold is of a certain grade is conclusive evidence of its being of that grade, and consequently, if it is so certified, no further condition as to its answering the description can be implied (w).

- 17. (1)** A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

Sale by sample.

(r) *Re Walkers, Winser & Hamm & Shaw & Co.* (1904) 2 K. B. 152, at p. 158; cf. *Les Affréteurs Réunis Société Anonyme v. Walford (London) Ltd.* (1919) A. C. 801. See further notes to s. 62.

(s) *Bombay United Merchants' Co. v. Doolubram* (1887) 12 Bom. 50.

(t) (1862) 7 H. & N. 955, 126 R. R. 783, Ex. Ch.

(u) Per Willes, J., *Mody v. Gregson* (1868) L. R. 4 Ex. 49, at p. 53. See

Baldry v. Marshall, *supra*, example (12). Compare *Wallis v. Pratt* (1911) A. C. 394.

(v) *Dickson v. Zizinia* (1851) 10 C. B. 602, 84 R. R. 719.

(w) Compare the Irish case *McClelland v. Stewart* (1883) 12 L. R. Ir. 125: (sale of timber classified by the official Russian surveyor). Compare *Benay Krishna v. North Bengal Sugar Mills Co. Ltd.* (1945) 2 Cal. 173.

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(2) In the case of a contract for sale by sample there is an implied condition—

- (a) that the bulk shall correspond with the sample in quality ;
- (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample ;
- (c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Examples.—The section may be illustrated by the following examples :—

(1) Sale by sample of two parcels of wheat containing 700 and 1,400 bushels respectively on the 11th September. The buyer went to examine the bulk on the 19th September. The parcel containing the 700 bushels which was lying in the seller's warehouse was shown to him, but the seller refused to show him the other parcel which was not then at the warehouse. The buyer was held entitled to rescind the contract and the fact that a few days later the seller offered the buyer the opportunity to inspect the second parcel did not affect the matter (x).

(2) Sale by sample of mixed worsted coatings to be in quality and weight equal to the samples. The goods owing to a latent defect would not stand ordinary wear when made up into coats and were therefore not merchantable. The same defect appeared in the samples but could not be detected on a reasonable examination. The buyer was held entitled to recover damages (y).

Sale by sample.—Evidence may be given of usage of trade to show that the sale was a sale by sample (z). On the other hand, a sale at which a specimen of the goods is exhibited may nevertheless not be a sale by sample, for it is consistent with the buyer relying on the description alone and not stipulating for conformity to the specimen produced (a). This distinction is not likely to be of frequent importance in modern practice. In a recent case (b) *Ameer Ali, J.*, decided that where samples are analysed and transformed into a formula, the sale may still be by sample.

Legal incidents of a sale by sample.—At common law the legal effect of a sale by sample is “ as if the seller had in express terms warranted

(x) *Lorymer v. Smith* (1822) 1 B. & C. 1.

(y) *James Drummond & Sons v. E. H. Van Ingen & Co.* (1887) 12 App. Cas. 284 ; cf. *Jatindra Chandra Banerjee v. Muralidhar* (1926) 43 Cal. L. J. 126, 94 I. C. 873, ('26) A. C. 749.

(z) *Syers v. Jonas* (1848) 2 Ex. 111, 76 R. R. 515.

(a) *Gardiner v. Gray* (1815) 4 Camp.

144, 16 R. R. 764 ; cf. *Tye v. Fynmore* (1813) 3 Camp. 462, 14 R. R. 809 ;

Meyer v. Everith (1814) 4 Camp. 22, 15 R. R. 722 ; *Ginner v. King* (1890) 7 T. L. R. 140, C. A. all, cases of written contracts which were silent as to the sale being a sale by sample.

(b) *Lalchand v. Baijnath* (1937) 63 Cal. 736, 169 I. C. 128, ('37) A. C. 140.

that the goods sold should answer the description of a small parcel exhibited at the time of the sale" and that as a general rule "the purchaser may reject the commodity if it does not correspond with the sample" (c), but, as in other like cases, not after he has accepted the goods or dealt with them as his own (d). The buyer is entitled to reasonable facilities for inspecting the bulk independently of any local or trade usage to that effect (e), and if there is any latent defect in the sample (that is, a defect not discoverable by the ordinary examination of a prudent buyer) which if present in the bulk, would render the goods unmerchantable, the sample is to be taken as if free from it (f). All these rules are now embodied in sub-section (2), which reproduces section 15 (2) of the English Act.

The last of them is really a special application of the principle that the seller's duty to furnish merchantable goods answering the description in the contract is paramount to any particular condition or warranty. It will not avail him that the sample was faulty. "When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty" (g). "Neither inspection of bulk nor use of sample absolutely excludes an enquiry whether the thing supplied was otherwise in accordance with the contract" (h). This is so even where the goods have been expressly warranted only equal to sample, for such a term limits the buyer's right to complain of the quality, but does not deprive him of the right to have the kind of goods he bargained for. (See section 15 *ante*.)

A mistake in the sample exhibited may prevent the formation of any contract at all, as where the sample is inadvertently taken from a bulk different from the specific bulk intended and expressed to be sold (i). It is hardly needful to say that such cases are rare.

(c) *Parker v. Palmer* (1821) 4 B. & Ald. 387, 391, 23 R. R. 313, 315, per Abbott, C. J.

(d) *Ibid. Quere*, if the goods are specific and the property has passed. See s. 13.

(e) *Lorymer v. Smith*, *supra*, example (1) Sub-section (2) (b) is based on this case, and refers to the right of inspecting the bulk before delivery, and is therefore not the same as the right of examination provided by s. 41. Consequently, where the former right is excluded either expressly or by necessary implication, the buyer still retains the latter and may reject the goods if on examination after delivery they prove not to be in accordance with the contract; *Polenghi v. Dried Milk Co.* (1904) 10 Com. Cas. 42;

E. Clemens Horst Co. v. Biddell Brothers (1912) A. C. 18.

(f) *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438. See Benjamin on Sale, 4th edition, 646 (shorter in 7th edition, 675).

(g) Per Lord Herschell in *Drummond v. Van Ingen & Co.*, *supra*, example (2), at p. 294.

(h) *Mody v. Gregson* (1868) L. R. 4 Ex. 49, 56.

(i) *Meggs v. Molloy* (1878) 2 L. R. Ir. 530. Contrast *Scott v. Littledale* (1858) 8 E. & B. 815, 112 R. R. 791, where the seller attempted to set up his own mistake in exhibiting a wrong sample as a defence to an action by the buyer for non-delivery, and was not permitted to do so.

CHAPTER III.

EFFECTS OF THE CONTRACT.

Transfer of property as between seller and buyer.

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18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Transfer of property.—This and the five following sections of the Act deal with the question adumbrated by section 4, and lay down certain rules which assist in deciding the question when the object of the contract of sale, namely, the transfer of the property in the goods to the buyer, has been effected.

Property cannot pass until the goods are identified.—It is a condition precedent to the passing of the property in every case that, to use an expression of Lord Ellenborough (j), “the individuality of the thing to be delivered” should be established. In any given case there may be a question whether this condition is fulfilled or not, and it may be that the property will not pass even if it is fulfilled, but until it is, there is no possibility of the property passing; or as put by Lord Blackburn, “it is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so (the contract) cannot be construed as a contract to pass the property in that article” (k).

This section is based upon this rule of law, though as a matter of verbal criticism it may be said that the rule would have been more clearly expressed if the section had declared that “no property in goods is transferred to the buyer by a contract of sale unless the contract attaches on specific or ascertained goods.” This however, is the substance of the section and indicates the point at which it becomes material to consider the question whether the property has in fact been transferred to the buyer in any given case.

Part of a specific whole.—It is obvious that if the contract is merely for the sale of goods by description, such as a contract for the sale of a certain quantity of malting barley, or of future goods, the necessary condition is not fulfilled. Nor is it fulfilled even if the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. “The parties did not intend to transfer the property in one portion of the stock more than in another, and the law which only

(j) *Busk v. Davis* (1814) 2 M. & S. 397, at p. 403, 15 R. R. 288.

(k) *Seath v. Moore* (1886) 11 App. Cas. 353, at p. 370; *Dan Singh v. Janki Saran* (1948) A. A. 396.

gives effect to their intention does not transfer the property in any individual portion" (l). And the mere fact that an order for delivery is given by the seller to the buyer, and is lodged by the buyer with a warehouseman, who holds the specified larger stock out of which the goods sold are to be taken, is not sufficient to transfer the property to the buyer (m). Similarly a contract for the sale of shares in a company, which are not identified by numbers, does not transfer any property to the buyer (n).

Property and risk.—In this class of case it is necessary to distinguish the passing of the property from the transfer of the risk; the risk usually passes with the property, but may pass independently of it. Thus acceptance of the delivery warrant for a certain quantity of spirit out of a larger bulk which was liable to deteriorate in storage, was held to put the risk of deterioration on the buyer, although he might have acquired, strictly speaking, not property but only an undivided interest in the whole bulk (o). Such an interest is insurable (p), but in English law, at any rate, it would seem that the possession of such an interest will not enable the person so interested to maintain trover for the undivided quantity against a wrongdoer (q), for in all probability there can be no separate tenancy of an undivided portion of goods in bulk. Equally it would seem that there can be none of an undivided part of a chattel, such as a tree which has been felled, of which a marked portion is sold, and of which the other portion is to be retained by the seller. In such a case, it is conceived, the whole tree

(l) *Blackburn on Sale*, p. 125, citing *White v. Wilks* (1813) 5 Taunt. 176, 14 R. R. 735; *Busk v. Davis*, *supra*; *Wallace v. Breeds* (1811) 13 East. 522, 12 R. R. 423; *Austen v. Craven* (1812) 4 Taunt. 644, 13 R. R. 714; *Shepley v. Davis* (1814) 5 Taunt. 617, 15 R. R. 598. Compare the judgment of Bailey, B., in *Gillett v. Hill* (1834) 2 Cr. & M. 530, at p. 535, 39 R. R. 833. See also *Re Wait* (1927) 1 Ch. 606, C. A.

(m) *Laurie & Morewood v. Dudin & Sons* (1926) 1 K. B. 223, C. A. This case gives the final quietus to *Whitehouse v. Frost* (1810) 12 East. 614, 11 R. R. 491, "which has had a distinguished career and has been doubted on more than one occasion." It is therefore unnecessary to discuss it. The reasons given for the decision seem to misapply the doctrine of constructive delivery.

(n) *Domingo v. de Souza* (1928) 50 All. 695, ('28) A. A. 481, cf. *Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co.* (1926) 53 I.A. 92, 50 Bom. 360, 94 I. C. 824, ('26) A. P. C. 38.

(o) *Sterns, Ltd. v. Vickers, Ltd.* (1923) 1 K. B. 78, C. A., and see s. 26 of the Act; *Demby Hamilton & Co., Ltd. v.*

Barden (1949) 1 All. E. R. 435.

(p) *Inglis v. Stock* (1885) 10 App. Cas. 263.

(q) *Sterns, Ltd. v. Vickers, Ltd.*, *supra*, at p. 84, per Scrutton, L. J., followed by Sankey, J., in *Laurie & Morewood v. John Dudin & Sons* (1925) 2 K. B. 383. The American and Canadian Courts treat the case of grain stored in elevators, in accordance with the conditions prevailing in the grain trade in those countries, as something *sur generis* and relax the rule to the extent of allowing that a person entitled to a portion of the bulk stored in an elevator has sufficient property in that portion to enable him to bring trover in respect of it, at any rate against the seller or warehouseman if he is refused delivery. See *Benjamin on Sale*, pp. 346-7. This passage was referred to by Sankey, J., in the above case, and the learned judge pointed out that some countenance was lent to this doctrine in English law by the case of *Whitehouse v. Frost*, *supra*. He declined, however, to follow *Whitehouse v. Frost*, and intimated that English law differed from the American and Canadian law, and his decision was affirmed by the Court of Appeal, *supra*, note (m).

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remains the property of the seller until the marked portion is severed, even if the severance is to be done by the buyer (*r*). In neither case is there any individuality of the unsevered portion and it only comes into existence as an individual chattel on severance; and a merely notional severance does not make it a chattel in which, as such, property can exist. More difficult is the question raised by the sale of growing timber. Where there is a contract of sale by which the seller sells all the marked trees on a specified piece of land to the buyer, the buyer being the person to cut them down, is such a contract capable of passing the property in the trees to the buyer at once, or only after they have been severed from the land? The contract is, no doubt, a contract for the sale of goods, by the express terms of section 2 (7), but the trees do not appear to have any existence as individual chattels until they are cut down and thus severed from the realty. It is possible perhaps to maintain the view that the trees are to be treated as individual chattels by virtue of the contract, and the land is to be considered as "a mere warehouse of the thing sold," so that the property in the trees may pass to the buyer at once, as if they were specific individual chattels. The matter, however, is not free from doubt (*s*), though it is clear that "a contract for the sale of specific timber growing on the vendor's property, on the terms that such timber is cut and carried away by the purchaser, certainly confers on the purchaser a licence to enter and cut the timber sold, and, at any rate as soon as the purchaser has severed the timber, the legal property in the severed trees vests in him" (*t*).

Identification of the goods.—The contract itself may provide for some specified event, sufficient to identify the goods, on the occurrence of which the property shall pass (*u*), and occasionally they may become identified by other means. Thus in a case where the seller sold 1,250 quarters of wheat out of a larger bulk belonging to him in a warehouse, and the buyer took delivery of 400 quarters and pledged the remaining 850 quarters to a Bank, and in the meantime the seller sold the remainder of the bulk in the warehouse, of which delivery was taken, so that 850 quarters only were left in the warehouse, it was held that by this process of exhaustion the 850 quarters were ascertained goods and the property therein had

(*r*) See *Acranan v. Morrice* (1849) 8 C. B. 449, at p. 457, per Maule, J., more fully in 19 L. J. C. P., at p. 59, 70 R. R. 568.

(*s*) The reasoning and some of the dicta of the judges in the case of *Marshall v. Green* (1875) 1 C. P. D. 35, seem to support the view above indicated, but see *Kursell v. Timber Operators & Contractors, Ltd.* (1927) 1 K. B. 298, C. A. That case shows that if the passing of the property depends upon the question whether the trees are in a deliverable

state, the property does not pass. But it must be remembered that the property may pass even if the goods are not in a deliverable state, if such be the intention of the parties.

(*t*) *Jones & Sons v. Earl of Tankerville* (1909) 2 Ch. 440, at p. 442, per Parker, J., thus leaving open the point under discussion.

(*u*) *Reeves v. Barlow* (1884) 12 Q. B. D. 436, C. A.; *Banbury and Cheltenham Rly. v. Daniell* (1885) 54 L. J. Ch. 265.

been transferred to the buyer, and the pledgee acquired a title thereto against the seller (*v*).

**Sec.
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19. (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Principles for determining whether the property is transferred.—When it appears that the contract attaches to specific or ascertained goods, so that it is possible that the property may be transferred to the buyer, it becomes necessary to determine whether it has been transferred in fact, and, as Lord Blackburn wrote many years ago (*w*), “this is properly speaking a question depending upon the construction of the agreement, for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement, and not before. In this, as in other cases, the parties are apt to express their intention obscurely, very often because the circumstances rendering the point of importance were not present to their minds, so that they really had no intention to express. The consequence is that, without absolutely losing sight of the fundamental point to be ascertained, the Courts have adopted certain rules of construction which in their nature are more or less technical.”

This section reproduces this statement in statutory form, and the rules of construction adopted by the Courts are those set out in sections 20 to 24.

Intention of the parties.—Sub-sections (1) and (2) expressly declare that in each case the intention of the parties, as expressed in the contract or to be inferred from their conduct and other circumstances of the case, is to be regarded. The desirability of enacting an express provision to this effect is demonstrated by the consequences of its omission from the Indian Contract Act. It might have been thought that, even in the absence of such a provision, the Courts would be free to give effect to the intention of the parties to a lawful contract of sale on such an important element of the

(*v*) *Wait and James v. Midland Bank* (1926) 31 Com. Cas. 172.

(*w*) Blackburn on Sale, p. 123.

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contract as the transfer of the property; and that view has on some occasions been acted upon (x). On others, however, the Court considered that it was necessary to hold that "if you find in a contract certain terms which, when they exist, the Legislature says that certain consequences shall ensue, those consequences must ensue," no matter how clearly in any given case the parties had agreed that they should not ensue (y). Whether the Indian Contract Act really did deny to merchants and others the right to make agreements for themselves relating to the transfer of the property, need not now be discussed. The Act expressly recognizes that right, and the Courts will not only be free but also bound to give effect to the agreement of the parties in the future. Cases, therefore, where in the past the Courts have done so may still be cited as authorities under the present law: while those in which the Court refused to do so would be decided in the opposite sense to-day.

Ascertained goods.—The term "ascertained goods," which also occurs in section 58, is not defined by the Act. It is, however, clear that "specific goods" bear the meaning assigned to them in the definition clause, "goods identified and agreed upon at the time a contract of sale is made." "Ascertained" probably means "identified in accordance with the agreement after the time a contract of sale is made" (z). Sections 23 and 25, therefore, must also be read subject to the provisions of this section, and regard must be had to the intention of the parties when considering whether the property has or has not passed in the circumstances dealt with by those sections.

20. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

Specific goods in a deliverable state.

Examples.—The section may be illustrated by the following examples:—

(1) Sale on the 4th January of a haystack on the seller's land at the price of £145 to be paid on the 4th February: the hay to be allowed to remain on the seller's land until the 1st May: no hay to be cut until the price was paid. The property in the haystack passed on the making of the

(x) *Amies v. Jal* (1923) 25 Bom. L. R. 778, 77 I. C. 150, ('24) A. B. 41.

(y) *Maclean, C. J., in Brij Coomaree v. Salamander Fire Insurance Co.* (1905) 32 Cal. 816, 823, followed *Bhimji Dalal v. Bombay Trust Corporation* (1930) 54

Bom. 381, 124 I. C. 800, ('30) A. B. 306; *Scott & Hodgson Ltd. v. Keshavlal* (1930) 54 Bom. 862, 128 I. C. 26, ('30) A. B. 529.

(z) *Atkin, L. J., In re Wait* (1927) 1 Ch. 606, at p. 630; *Prem Singh v. Deb Singh* (1948) A. P. C. 20.

contract, and on the stack being destroyed by fire, the buyer must bear the loss (a).

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(2) Sale of a specified number of bushels of oats, the contents of a bin in a warehouse. The seller gives a delivery order to the buyer, addressed to the warehouseman, authorizing delivery of the oats to the buyer, and asking the warehouseman to weigh them. The warehouseman accepts the order and enters it in his books. The property has passed to the buyer, as the weighing was not necessary to identify the oats or to ascertain the price, but was merely for the satisfaction of the buyer (b).

Sale of specific goods.—This and the two succeeding sections deal exclusively with the case where the goods which form the subject-matter of the contract of sale are identified and agreed upon at the time when it is made, so that from its inception it attaches to goods of which the individuality is established. It has already been seen (c) that in such cases the contract is effectual according to the law of England to change the property : and in the absence of evidence of a contrary intention it will do so, if nothing remains to be done by the seller in order to complete the sale as between him and the buyer. If, however, something does so remain to be done by the seller, the presumption is that the parties do not intend that the property should pass until it shall have been done. These are the rules of construction embodied in the Act ; the present section states the first rule ; the two subsequent sections deal with the two main instances of the second rule : and as the cases which lay down the second rule incidentally lay down the first also, it is not necessary to do more than to refer the reader to the notes to the next two sections for instances of the judicial enunciation of the rules.

Matters which do not displace the presumption.—The rule will operate not only when the time of payment of the price or delivery of the goods, or both, is postponed (d), but also in cases where the price is not fixed by the contract (e). Similarly “it may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed ” (f).

The mere fact, moreover, that something remains to be done by the buyer under the contract with reference to the goods, is not of itself

(a) *Tarling v. Baxter* (1827) 6 B. & C. 360, 30 R. R. 355.

(b) *Swanwick v. Sothorn* (1839) 9 A. & E. 895, 48 R. R. 740.

(c) See Note to s. 4 (3) *ante*, pp. 30-33.

(d) *Tarling v. Baxter*, *supra*, example (1).

(e) *Joyce v. Swann* (1864) 17 C. B.

(N. S.) 84, 142 R. R. 258 ; *Shankar Lal v. Jamna Das* (1938) 175 I. C. 440, ('38) A. L. 30.

(f) Per Lord Blackburn, *Seath v. Moore* (1886) 11 App. Cas. 350, at p. 370 ; *Peare Lal-Kishan Prasad v. Diwan Singh-Ganeshi Lal* (1930) 28 All. L. J. 777, 125 I. C. 453, ('30) A. A. 661.

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sufficient to displace the presumption, though this perhaps was not formally decided until the case of *Turley v. Bates* came before the Court of Exchequer in 1863 (g). In that case the contract was for the sale of a heap of clay as a whole at a certain price per ton, and by the contract the buyer was to load the clay on his own carts, and to weigh each load at a certain weighing machine which his carts had to pass on their way from the seller's ground, on which the heap of clay lay, to the buyer's place of deposit. In these circumstances it was held that the property in the clay had passed to the buyer. The clay was in a state in which the buyer was bound to take delivery of it, and nothing further remained to be done by the seller to ascertain the price: and the contention (which received some countenance from the work of Lord Blackburn) that the property did not pass, because something remained to be done by the buyer, was rejected. Similarly where the plaintiff contracted with the defendant to sell him 975 maunds of rice, being the whole contents of a certain gola at a certain rate, and the defendant paid certain earnest-money and agreed to remove the whole of the rice after weighing on or before a certain date, and delivery was taken of a part, it was held that the property in the goods had passed to the defendant. In this case "so far as the vendors were concerned nothing remained to be done on their part to the rice sold for the purpose of ascertaining the amount of the price. The rice was to be weighed for the satisfaction of the purchaser" (h).

Intention of the parties to be regarded.—It must be borne in mind, however, that these rules are but *prima facie* rules of construction, and in each case the intention of the parties must be ascertained, and when ascertained, acted upon. Thus the High Court of Calcutta decided in a case where nothing remained to be done to the goods by the seller for the purpose of ascertaining the amount of the price, that the property did not pass to the buyer, since the intention of the parties, to be inferred from the usage of the trade, was that the sale should not be complete until the goods had been tested, selected and weighed by the buyer (i). And in a recent Bombay case, an agreement for the sale of a motor car, of which the price was to be paid in monthly instalments, contained among others a term that in default of payment of any one instalment the seller should be at liberty to terminate the agreement and take possession of the car without being liable to refund to the buyer the instalments paid by him. The Court held that the intention of the parties as expressed in the conditions

(g) 2 H. & C. 200, 133 R. R. 639. In some reports the plaintiff's name is given as *Furley*. Compare *Kershaw v. Ogden* (1865) 3 H. & C. 717, 140 R. R. 694.

(h) *Shoshi Mohun Pal v. Nobo Krishto* (1878) 4 Cal. 801. Compare *Swanwick*

v. Sothorn, *supra*, example (2); *Nanka-Bruce v. Commonwealth Trust* (1926) A.C. 77, P. C.; *Peare Lal-Kishan Prasad v. Diwan Singh-Ganeshi Lal* (1930) 28 All. L. J. 777, 125 I. C. 453, ('30) A. A. 661.

(i) *Abdul Aziz v. Jogendra Krishna* (1916) 44 Cal. 98, 36 I. C. 119.

was that the property in the car should not pass until the full price was paid (j).

On the other hand, where the defendant agreed to sell paddy to the plaintiff on the terms that the plaintiff should pay 1,000 rupees in advance, and the balance of price on delivery, and it was agreed that an assignment of a debt of 100 rupees and a hundi for 900 rupees should be accepted as payment of the advance, it was held by the High Court of Madras that the property in the goods passed to the plaintiff on assignment of the debt and delivery of the hundi by the plaintiff to the defendant, and that the plaintiff was entitled to damages for the wrongful sale of the paddy to a third person (k).

Deliverable state.—It will be observed that under the section the goods must be in a deliverable state in order that the presumption may apply. Consequently where the contract was for the sale of a fixed condensing engine, which had to be severed and delivered free on rail at a specified price, and it was damaged in transit before it reached the railway, it was held that the property had not passed, as when it reached the railway it was not in a deliverable state (l). And in a recent case where the contract was for the sale of all the merchantable timber growing in a large forest to be cut by the buyers, merchantable timber being defined as “all trunks and branches of trees, but not seedlings and young trees of less than 6 in. in diameter at a height of 4 ft. from the ground,” the timber to be cut not more than 12 in. from the ground, and the purchaser had fifteen years in which to cut the timber, it was held (*inter alia*) that the timber was not in a deliverable state until the buyers had severed it and therefore the property in the timber did not pass when the contract was made (m).

Sale of moveable and immoveable property combined.—By section 85 of the Indian Contract Act a special rule was inserted that where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property. This section has been omitted from the present Act, as it is mainly a question of intention, but, on the face of it, a contract of this kind is no more than a contract that when the conveyance is completed the moveable property shall be sold, and the property therein does not pass before that time (n). As to the period of limitation for a suit by a purchaser of moveable and immoveable property to recover the

(j) *Amies v. Jal* (1923) 25 Bom. L. R. 778, 77 I. C. 150, (24) A. B. 41. The cases which conflict with this decision can under the present law be disregarded. See p. 92 *ante*.

(k) *Kuttayan Chetty v. Palaniappa Chetty* (1904) 27 Mad. 540; cf. *Aronson v. Mologa Holzindustrie A./G. Leningrad*

(1928) 138 L. T. 470, C. A.

(l) *Underwood v. Burgh Castle Cement Syndicate* (1922) 1 K. B. 343, C. A.

(m) *Kursell v. Timber Operators and Contractors, Ltd.* (1927) 1 K. B. 298, C. A.

(n) *Lanyon v. Toogood* (1844) 13 M. & W. 27.

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moveable property from the hands of a subsequent purchaser, see *Dhondiba v. Ramchandra* (o).

21. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

Example.—The section may be illustrated by the following example :—

Sale of the whole contents of a cistern of oil, the oil to be put into casks by the seller and then taken away by the buyer. Some of the casks are filled in the presence of the buyer, but before any are removed, or the remainder are filled, fire destroys the whole of the oil. The buyer must bear the loss of the oil which had been put into the casks, the seller that of the remainder (p).

Seller to put the goods into a deliverable state.—The rule laid down in this section is, as Lord Blackburn pointed out, not older than the nineteenth century, but it is so well settled that the authority of Lord Blackburn's own statement is really sufficient. "Where," he says, "by the agreement, the seller is to do anything to the goods for the purpose of putting them into that state in which the buyer is to be bound to accept them, or, as it is sometimes worded, into a 'deliverable state,' the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property... In general it is for the benefit of the seller that the property should pass; the risk of loss is thereby transferred to the buyer (q), and as the seller may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the seller pure gain. It is therefore reasonable that where by the agreement the seller is to do something before he can call upon the buyer to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be, that the seller was to do this before he obtained the benefit of the transfer of the property" (r).

Notice to the buyer.—It can also be plausibly argued that it is equally reasonable that the risk should not be transferred to the buyer without notice that the seller has done what remained to be done on his part, and this view commended itself to the framers of the English Act,

(o) (1881) 5 Rom. 554.

(p) *Rugg v. Minett* (1809) 11 East.
210, 10 R. R. 475, (facts slightly

modified).

(q) See s. 26.

(r) Blackburn on Sale, pp. 174-175.

with the result that the common law was modified in favour of the buyer by the addition of the words "and the buyer has notice thereof" at the end of rules 2 and 3 of section 18, which correspond to this and the following section respectively. Those sections incorporate the same modification of the common law.

It does not seem, however, that the notice need necessarily be given by the seller; it would appear that the knowledge of the fact, however derived, is sufficient.

Judicial statements of the rule.—A few years after Lord Blackburn wrote, the rule was declared by the Judicial Committee of the Privy Council.

"By the law of England, by a contract for the sale of specific ascertained goods the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Various circumstances have been treated by our Courts as sufficiently indicating such contrary intention. If it appears that the seller is to do something to the goods sold on his own behalf, the property will not be changed until he has done it, or waived his right to do it" (s).

An earlier judicial statement is as follows :—"Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed" (t).

This statement sums up the result of cases in which it has been held, as to liquids bought in bulk and to be delivered by the seller in casks, that the property passed as and when the casks were completely filled up, but the contents of the casks not yet filled were the seller's property and at his risk, although the total quantity sold and the price were ascertained, the test for the passing of the property being that "nothing remained to be done by the seller in order to complete the sale as between him and the

(s) *Gilmour v. Supple* (1858) 11 Moo. P. C. 551, 566, 117 R. R. 97, 106, a Canadian case of a timber raft broken up by a storm at the wharf to which it had been floated down. The timber had already been measured and specified. See and distinguish *Logan v. le Mesurier* (1847) 6 Moo. P. C. 116, 79 R. R. 10, a case from Lower Canada (under old

French law, but there was stated to be no difference between this and the common law for the purpose in hand) where the measuring was to be done after arrival, and it was held that neither property nor risk had passed.

(t) Bayley, J., in *Simmons v. Swift* (1826) 5 B. & C. 857, at p. 862, 29 R. R. 438, at p. 440. See the examples to the next section.

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buyer" (u). It is not clear that when these cases were decided evidence of contrary intention would have been admitted, but it is now provided by the Act that the intention of the parties prevails. But property in unfinished goods may pass if the goods are ascertained and pointed out with the intention of transferring ownership (v).

Collateral acts.—A merely collateral act to be done by the seller with respect to the goods, such as paying warehouse charges (w), or duties (x), will not negative an inference from the other circumstances that the property has passed. The rule has been applied to the sale of a literary production which the author had undertaken to revise and correct (y).

22. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of a stack of bark at a certain price per ton, the bark to be weighed by the seller's and buyer's agents. Part was weighed and taken away, but before anything more was done a flood carried away the remainder. The loss of this fell upon the seller (z).

(2) Sale of 289 specified bales of goatskins, containing five dozen in each bale, at a certain price per dozen. By the usage of the trade, it was the seller's duty to count the bales to see whether they contained the number specified in the contract. Before the seller had done this the bales were destroyed by fire. The loss fell on the seller (a).

Acts to be done by seller for purpose of ascertaining the price.—This, like the previous rule, was not known before the nineteenth century, and Lord Blackburn states it in the form that "where anything remains to be done to the goods for the purpose of ascertaining the price as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of those things,

(u) *Rugg v. Minett*, *supra*, example ;
Wallace v. Breeds (1811) 13 East. 522,
12 R. R. 423.

(v) *Young v. Matthews* (1866) L. R.
2 C. P. 127.

(w) *Hammond v. Anderson* (1804) 1
B. & P. N. R. 69, 8 R. R. 763.

(x) *Hinde v. Whitehouse* (1806) 7 East.

558, 8 R. R. 676.

(y) *Ramiah Asari v. Chidambara
Mudaliar* (1920) 39 M. L. J. 341, 59 I. C.
229.

(z) *Simmons v. Swift* (1826) 5 B. & C.
857, 29 R. R. 438.

(a) *Zagury v. Furnell* (1809) 2 Camp.
240, 11 R. R. 704.

also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted," and proceeds to criticize it on the ground that it had been "somewhat hastily adopted from the civil law without adverting to the great distinction made by the civilians between a sale for a certain price in money and an exchange for anything else" (b), but that distinction itself appears to be now definitely adopted in English law. Moreover when Lord Blackburn wrote it was not clear whether the rule applied only to acts to be done by the seller, or included acts to be done by the buyer. The alleged following of the Roman law would be more exactly described as a following of the great French jurist, Pothier, of which indeed, Lord Blackburn was quite aware. It cannot be strictly verified, but there is no doubt that in the early days of the nineteenth century, when English authority was still scanty on many parts of commercial law, Pothier was freely used by English lawyers. The matter is now only of historical interest, and the rule, limited as it is to acts to be done by the seller, was adopted by the English Act, section 18, rule 3, which is reproduced by this section, with the modification in favour of the buyer that he must have notice of the doing of the act in question by the seller. Again, however, the rule is merely a *prima facie* rule of construction and, consequently, the sale may be complete even before the price is finally ascertained, if such is the intention of the parties, and the manner of ascertaining the price, as by measurement of the goods, is agreed upon; for it is "perfectly clear, especially after the case of *Turley v. Bates* (c), that the real question in all these cases, is whether the parties did intend that the property should pass" (d).

As to acts to be done by the buyer, see notes to s. 20, p. 94 *ante*.

Agreement remains executory until the condition is fulfilled.—Whether the condition precedent to the passing of the property is one which is implied, or is expressly made by the parties, its effect is the same, the property does not pass till the condition is fulfilled (e). Consequently, "in the interval between the making of the agreement and the fulfilment of those conditions on which the property is to vest, the buyer has no interest in the thing itself, and it follows as a necessary consequence that, if in the interval a third party has fairly acquired an interest in the chattel, the buyer cannot on the fulfilment of the conditions deprive him of it. He may have a remedy against the seller for breaking his agreement,

(b) Blackburn on Sale, pp. 174-5.
(c) (1863) 2 H. & C. 200, 133 R. R. 639. See p. 94 *ante*.

(d) *Martineau v. Kitching* (1872) L. R. 7 Q. B. 436, 449 per Cockburn, C. J.; *Eldon (Lord) v. Hedley Brothers* (1835) 2 K. B. 1; *Hæ Kin Seing v. Maung Ba*

Chit (1935) 62 I. A. 242, 14 Rang. 1, 157 I. C. 891, ('35) A. P. C. 182.

(e) "If a personal thing be granted upon a condition precedent, the property does not vest till the condition performed." *Comyns' Digest: Condition* (B. 3).

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by suffering this interest to be created, but he cannot take the property in derogation of a right acquired, whilst the agreement was only executory and he had no interest in the goods but only a chose in action" (f).

23. (1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of twenty hogsheads of sugar out of a larger quantity. The seller fills four hogsheads which the buyer takes away. Subsequently the seller fills sixteen more hogsheads, and informs the buyer of this, asking him to come and take them away. The buyer promises to do so. The property has passed to the buyer (g).

(1a) A contracts to sell to B a certain quantity of liquor out of a big cask containing a much larger quantity. The required quantity is not separated or bottled. The property in the liquor does not pass to the purchaser (h).

(2) Sale on May 6th of eight hundred and fourteen tins of oil, for which the buyer pays the price. The goods were not in the possession of the sellers at the date of the contract, but had been dispatched to them on April 25th. Subsequently they received the railway receipt and endorsed it and sent it to the buyers. Afterwards, on May 12th, the

(f) Blackburn on Sale, p. 196.

(g) *Rohde v. Thwaites* (1827) 6 B. & C. 388, 30, R. R. 363. Compare *Pignataro v.*

Gilroy (1919) 1 K. B. 459.

(h) *Emperor v. Kuwerji Kavasji* (1941) 43 Bom. L. R. 95, 194 I. C. 302, ('41) A. B. 106.

goods were destroyed by fire while in transit. The property had passed to the buyers and they had to bear the loss (4).

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(3) Sale of shares. The broker hands the certificates to the buyer, together with transfers signed in blank by the registered holders. The shares are ascertained, the sale is complete and the property has passed to the buyer (5).

Appropriation.—When one man sells to another goods which are not specifically defined, it is necessary that they should in some manner agree upon what is to be delivered in fulfilment of the contract, for until this is done there are no goods on which the contract can attach. When, however, the goods to be delivered under the contract have been identified, in a manner binding on the parties, as the goods on which the contract is to attach, and therefore as the goods in which the property is to be transferred to the buyer, and nothing further remains to be done to pass the property, the property may, and, in the absence of a contrary intention, will pass: nor does the fact that the seller intimates that he will not deliver, or refuses to deliver, except on payment of the price, of itself displace the presumption; for, as has already appeared, the right of the seller to retain possession of the goods until payment is quite consistent with the change of property (6). It is this which is described in the section as an unconditional appropriation of the goods in a deliverable state to the contract by one of the parties with the assent of the other. The term “appropriation,” unfortunately, may also be used in the sense that the goods have been identified by the agreement of the parties as the goods about which they are contracting, so that the contract can never apply to any other goods, and the seller would be guilty of a breach of contract if he did not deliver them, and yet the property may not pass, so that if the seller sold them to someone else he could not be sued by the buyer in trover (7). This, however, is not the sense in which the word is used in the section.

Where both parties have subsequently assented to the appropriation of some specific goods to fulfil the agreement, no difficulty arises. The effect is then the same as if they had from the first agreed upon the sale of those specific goods. The selection of the goods by the one party and the adoption of that act by the other converts that which before

(4) *Shanker Das-Joti Parshad v. Bhano Ram-Sheo Dial* (1926) 7 Lah. 406, 97 I. C. 765, (26) A. L. 606. Followed; *Kanshi Ram v. Mul Chand-Bhagwan Das* (1930) 127 I. C. 158, (30) A. L. 469.

(5) *Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co.* (1926) 53 I. A. 92, 50 Bom. 360, 94 I. C. 824, (26) A. P. C.

38. See also *Kuppiah Chetty v. Saraswathi* (1941) 2 M. L. J. 571, (41) A. M. 769.

(6) See s. 20, p. 94 *ante*. See also s. 25, pp. 116, 117 *post* and s. 32.

(7) See *Laidler v. Burlinson* (1837) 2 M. & W. 602, 610, 46 R. R. 717; *Wait v. Baker* (1848) 2 Ex. 1, 8-9, 76 R. R. 469, per Parke, B.

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was a mere agreement to sell into an actual sale, and the property thereby passes (m).

The appropriation may be, and often is quite distinct from delivery. A buyer may, by his conduct, impliedly assent to an appropriation, e.g., where he writes or telephones or sends his servant and says: "please send me or let me have a bottle of gin," he is leaving it to the seller to appropriate a bottle out of his stock to the buyer, and as soon as the seller does so the sale is complete. The place of sale in such a case is the seller's premises (n).

"But the difficulty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, unless it was made in pursuance of an authority to make the election conferred by agreement, or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties.

"The question of whether there has been a subsequent assent or not, is one of fact (o); the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of some nicety.

"The general rule laid down by Lord Coke in *Heyward's* case (p), and adopted in Comyns' Digest, *Election*, seems to be that when from the nature of an agreement an election is to be made, the party, who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; when once he has performed the act the choice has been made and the election irrevocably determined; till then he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice.

(m) *Rohde v. Thwaites*, *supra*, example (1), per Holroyd, J., p. 393; *Siddique & Co. v. Rangiah Chettiar* (1948) Mad. 157, (1948) A. M. 122, in appeal from (1947) 2 M. L. J. 79.

(n) *Furby v. Hay* (1947) 1 All. E. R. 238, D. C.

(o) See *Rohde v. Thwaites* and *Pignataro v. Gilroy*, *supra*, example (1), as illustrations of cases where the assent was established, and *Healey v. Howlett*

& Sons (1917) 1 K. B. 337, as an illustration of a case where it was not. In order to be effective the appropriation must take place before repudiation or breach of contract by either party. On the other hand, assent express or implied to an appropriation is an indication of an intention to keep the contract alive; *Bij Raj v. Pershad Wazir Singh* (1925) 88 I. C. 230, 7 Lah. L. J. 512, (25) A. L. 581. (p) 2 Co. Rep. 36. a.

"It follows from this, that where from the terms of an executory agreement to sell unspecified goods, the vendor is to dispatch the goods, or to do anything to them that cannot be done until the goods are appropriated, he has the right to choose what the goods shall be; and the property is transferred the moment the dispatch or other act has commenced, for then an appropriation is made, finally and conclusively, by the authority conferred in the agreement, and in Lord Coke's language, 'the certainty, and thereby the property begins by election' (g);—but however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced, the appropriation is not final, for it is not made by the authority of the other party, nor binding upon him (r)."

It is therefore not surprising that, as Sir Mackenzie Chalmers says in his commentary, "it is often a nice question of law whether the acts done by the seller merely express a revocable intention to appropriate certain goods to the contract"—i.e., specify them as the goods contracted for—"or whether they show an irrevocable determination of a right of election." That learned author maintains that in every case where it has been held that there was an irrevocable election there was delivery, actual or constructive, to the buyer (s). The following cases, which may be cited as additional examples of sub-section (1), bear out that view.

(1) *A* contracts with *B* to sell him all the oil to be produced from the year's crop of peppermint of *A*'s farm. When the crop is got in, and the oil made, *A* puts the oil into bottles furnished by *B*. By this appropriation the oil becomes the property of *B* (t).

(2) *A* contracts to sell *B* 200 maunds of grain out of a greater bulk which *B* has seen and approved, and it is agreed that *B* shall send his own sacks to be filled. *B* sends a sufficient number of sacks, and 150 maunds of the grain are put into *B*'s sacks by *A*'s servants and made ready for dispatch. Afterwards *A* countermands his orders for sending the filled sacks to *B* and causes the grain in them to be turned out and mixed with the bulk. The grain put in the sacks became *B*'s property as each sack was filled, and did not cease to be so by *A*'s subsequent wrongful dealing with it (u).

(g) *Heyward's case*, *supra*.

(r) Blackburn on Sale, pp. 129-130. This concise statement was approved by Erle, J., in *Aldridge v. Johnson* cited *infra*.

(s) Chalmers, p. 64. The questions of the goods being finally ascertained and

of the property passing to the buyer, should, as the learned author points out, be carefully kept distinct.

(t) *Langton v. Higgins* (1859) 4 H. & N. 402, 118 R. R. 515.

(u) *Aldridge v. Johnson* (1857) 7 E. & B. 885, 110 R. R. 875.

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(3) *B* sends an order from Madras to *A*, a manufacturer at Calcutta, for certain goods "to be dispatched on insurance being effected." *A* packs goods according to the order in a cask marked with *B*'s initials, and ships it from Calcutta to *B*, having insured the goods in *B*'s name. The goods become *B*'s property as soon as they are dispatched from Calcutta (*v*).

(4) *A* contracts to sell to *B* 100 maunds of grain, according to a sample produced, out of a larger bulk which *B* has not seen, and which is already in sacks of *A*'s. *A* marks a certain number of these sacks with *B*'s name and the words "To wait orders." The sacks so dealt with do not become *B*'s property in the absence of specific assent from *B*, or previous authority from *B* to *A* to select them on *B*'s behalf (*w*).

(5) Goods answering the description in a contract were manufactured by the vendor and by him appropriated to the contract, and the purchaser on being informed of it directed the vendor to mark and dispatch them for shipment according to certain instructions, and the goods were marked and dispatched from the vendor's mill, but could not be shipped, as the vessels named by the purchaser were not available at their usual place:—*Held* that the property in the goods passed to the purchaser, and he was liable in damages for declining to take delivery of the goods. "The act of dispatching the goods from the mill was the act of the defendant (i.e., the purchaser) through his agents, the plaintiffs, and this act of the defendant constituted an implied assent to the appropriation by the plaintiffs, which then became no longer revocable" (*x*). The conduct of the purchaser in directing the vendor to mark and dispatch the goods for shipment shows that he assented to the appropriation which the vendor had made. The conduct of the vendor in marking and dispatching them was a complete compliance with the directions of the purchaser, who had not instructed him to ship the goods, but only to dispatch them for shipment. Hence the case is easily distinguishable from *Jenner v. Smith* (example 4), where the purchaser gave no instructions to the vendor, and never signified his assent to such appropriations as had been made. There the appropriation was clearly only conditional on the purchaser giving the necessary orders (*y*).

(*v*) *Fragano v. Long* (1825) 4 B. & C. 219, 28 R. R. 226.

(*w*) *Jenner v. Smith* (1869) L. R. 4 C. P. 270. Compare *Healy v. Howlett & Sons* (1917) 1 K. B. 337.

(*x*) *Clive Jute Mills Co. v. Ebrahim Arab* (1896) 24 Cal. 177, 182.

(*y*) If a purchaser without inspection takes possession of the goods, or exercises

proprietary rights over them, he thereby gives his implied assent to the appropriation effected by the seller. See *Buchanan v. Airdall* (1875) 15 B. L. R. 276, 283, 291-293; and cf. *Pranlal Bhaichand v. Maneckji Petit Manufacturing Co.* (1932) 34 Bom. L. R. 1252, 140 I. C. 610, ('33) A. B. 46. There is nothing in this, of course, beyond the English authorities.

(6) *A* contracts to sell to *B* 1,999 bales of jute, the goods to be placed alongside s. s. "Uganda," and to be paid for in cash against the mate's receipts. The goods are marked by *A* with *B*'s private mark pursuant to *B*'s instructions, and they are placed alongside the vessel, and shipped in due course. The mate's receipts are made out in *B*'s name, and *A* sends them on to *B*, together with his bill for the price. *B*, without paying for the goods, exchanges the receipts for bills of lading, and pledges them with *C*, who advances the money in good faith. *B* becomes insolvent. *A* sues *C* for the price of the goods, alleging that the property in the goods did not pass to *B*, and *B* therefore could not make a valid pledge thereof:—*Held*, that the property in the goods passed to *B*, the above facts affording sufficient evidence of an appropriation by *A* of the goods to the contract, and of *B*'s assent to the appropriation. *Held*, further, that a clause in the contract, that if *B* retained the mate's receipts without paying for the goods the receipts should be deemed to be the property of *A* until *B* paid for the goods, did not render the appropriation conditional only. The effect of that clause was, it was said, not to reserve the *jus disponendi* in *A*, but to provide him with a security for due payment of the price of the goods by empowering him to hold possession of the mate's receipts, and so to prevent *B* from dealing with the goods until the price was paid (*z*).

Delivery to a carrier.—Sub-section (2) gives statutory recognition to an important point in this connexion, namely that where goods are delivered to a carrier or the like for transmission to a buyer, the carrier is presumed to be the buyer's agent not only to take delivery, but to assent to the appropriation to the contract of the goods so delivered, subject of course to any just grounds of exception which may subsequently be discovered. "It may be admitted," said Baron Parke in 1848, "that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee and such a delivery amounts to a delivery to the vendee (*a*); and if there is a binding contract between the vendor and vendee, ... (*b*) then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract" (*c*).

(*z*) *Juggernath Augurwallah v. Smith* (1906) 33 Cal. 547.

(*a*) This had already been treated as settled in 1803; *Dutton v. Solomonson*, 3 B. & P. 582, 7 R. R. 883.

(*b*) The omitted words referring to the Statute of Frauds have no application in India.

(*c*) *Wait v. Baker* (1848) 2 Ex. 1, 7, 76 R. R. 469, 474; cf. *Badische Anilin Fabrick v. Basle Chemical Works* (1898) A. C. 200, at pp. 203-204; *Buch & Co. v. Gordhandas Mavji* (1922) 24 Bom. L. R. 991, 70 I. C. 877, ('23) A. B. 92; *Deoraj v. Munshi Ram* (1926) 48 All. 622, 96 I. C. 130, ('26) A. A. 679 (but see p. 113, *post* as to this case).

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The learned judge then proceeds to point out the difference between delivery to a common carrier and delivery on board ship, but it will be more convenient to discuss this later under section 25, between which section and this the next section, which deals with a totally different subject-matter, is somewhat awkwardly interpolated.

Unfinished ships, etc.—The question of appropriation often arises in the case of the sale of things which take a long time to manufacture, such as ships. Usually speaking, “where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered” (d).

“But it is competent to parties to agree for valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has attained a certain stage : though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against its being the intention of the parties that the property should then pass. . . . It is a question of the construction of the contract in each case, at what stage the property shall pass, and a question of fact in each case whether that stage has been reached” (e).

As regards contracts for the building of such things as ships, however, where the price of a ship in course of construction is payable by instalments, a special rule of construction is established by the English authorities, viz., that the property in the unfinished ship passes on payment of the first instalment and subsequent additions become the buyer's property as they are worked into the ship (subject, in all these cases, to evidence of a contrary intention), and that despite the fact that the article is not in a deliverable state. The payment of instalments is held “to appropriate specifically to the buyer the very ship so in progress, and to vest in him a property in that ship” (f). The result is that “as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any

(d) *Atkinson v. Bell* (1828) 8 B. & C., 277, 282, 32 R. R., at p. 386, per Bayley, J.

(e) *Seath v. Moore* (1886) 11 App. Cas. 350, 370, per Lord Blackburn.

(f) *Woods v. Russell* (1822) 5 B. & Ald. 942, 946. That there is no rule of law in

the matter but only a rule of construction, is settled by *Clarke v. Spence* (1836) 4 Ad. & E. 448, 43 R. R. 395, and see *Laing v. Barclay, Curle & Co.* (1908) A. C. 35. See also *In re Blyth Shipbuilding and Dry Docks Co., Ltd.* (1926) Ch. 494, C. A., reviewing all the cases.

other" (g), and this has long been taken as a settled rule (h). Contrary to an opinion formerly held, it does not extend to auxiliaries intended to belong to the ship, not forming part of the structure, such as engines, before they are fitted in the vessel and approved as parcel of it (i).

Where the purchaser has paid part of the instalments by accepting bills drawn by the vendor, which have been discounted with third parties, and the purchaser and vendor subsequently become bankrupt, the holders of the bills have no lien on the ship if the bills are dishonoured (j).

The principle is not confined to ships; it seems that "the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state" (k). There may be a contract for the sale of the component parts of a whole structure or the like as parts, coupled with a contract that the seller shall put them together after delivery to the buyer. Here the parts as delivered are appropriated to the contract and become the buyer's property (l). Contracts for the building of ships, however, stand on a special footing in that if the ship is to be paid for by instalments, and there is no express provision as to when the property is to pass, the Court will infer from the fact of payment being made by instalments that the property in the portion completed is intended to pass to the purchaser as the payments are made (m). The goods in question must be shown by sufficient evidence to be appropriated to the contract. Being worked into the body of a ship in construction is evidence of appropriation. The mere fact of being fitted and intended by the maker to form part of a particular ship and destined for a certain place in the structure, but not yet in that place, is not sufficient (n).

It is not indispensable in order to maintain this inference, that there shall have been in the original contract a stipulation for payment by instalments, or that the instalment has actually been paid. The absence of these considerations might be supplied by the other circumstances from which the inference could be drawn. There must, however, always be facts admitted or proved sufficient to warrant the inference that the purchaser has agreed to accept the completed portion of the ship in

(g) *Woods v. Russell* (1822) 5 B. & Ald. 942, 946, 24 R. R. 621, 624.

(h) *Mellish, L. J.*, in *Ex parte Lambton* (1875) L. R. 10 Ch. App. 405, 414.

(i) *Wood v. Bell* (1856) 6 E. & B. 355, 103 R. R. 749, Ex. Ch.; *Seath v. Moore* (1886) 11 App. Ca. 356, 381, 385; *Reid v. Macbeth & Gray* (a Scottish case) (1904) A. C. 223; *In re Blyth Shipbuilding and Dry Docks Co., Ltd.*, *supra*.

(j) *Ex parte Lambton*, *supra*.

(k) *Seath v. Moore* (1886) 11 App. Ca., at p. 385, per Lord Bramwell.

(l) *Pritchett & Gold, etc., Co. v. Currie* (1916) 2 Ch. 515, C. A.

(m) *Ex parte Lambton*, *supra*; *Seath v. Moore*, *supra*, 11 App. Cas. p. 380; *In re Blyth Shipbuilding and Dry Docks Co.*, *supra*.

(n) *Reid v. Macbeth & Gray* (1904) A. C. 223; *In re Blyth Shipbuilding and Dry Docks Co.* (1926) Ch. 494, C. A.

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part fulfilment of the contract of sale (o). The governing consideration is what did the parties intend, and if there is a condition that the ship is not to be considered accepted until she has passed satisfactory steam trials, the property will not pass until that condition has been fulfilled (p). This presumption or inference will not arise in the case of machinery or materials to be fitted to a ship which is already in existence (q).

24. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

Goods sent on approval or "on sale or return".

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Examples.—The section may be illustrated by the following examples.

- (1) Goods delivered on sale or return are pledged by the deliverer. He thereby becomes the buyer of the goods, and the original owner cannot recover the goods from the pledgee (r).
- (2) Goods delivered on sale or return to the defendant are delivered by him on similar terms to another. The latter in turn hands them to a fourth person, who loses them. The defendant, being unable to return the goods, must pay for them as if he had actually agreed to become the buyer (s).

Delivery of goods on sale or return.—A delivery of goods on approval, or what is called "sale or return," might have been held to pass the property subject to a condition that it should revert in the former owner if the optional buyer returned the goods within the prescribed time, or, in the absence of any stated term, a reasonable time. But the accepted rule, which is adopted by the Act, is that in such a case there is generally

(o) *Laidler v. Burlinson* (1837) 2 M. & W. 602, 46 R. R. 717; *Seath v. Moore*, 11 App. Ca., at p. 380.

(p) *Laing v. Barclay, Curle & Co.* (1908) A. C. 35.

(q) *Anglo-Egyptian Navigation Co. v.*

Rennie, L. R. 10 C. P. 271, at pp. 280, 281.

(r) *Kirkham v. Attenborough* (1897) 1 Q. B. 201, C. A.

(s) *Genn v. Winkel* (1912) 107 L. T. 434, C. A.

no complete sale until the buyer has either (1) signified his approval, which may be either expressly or by dealing with the goods as owner (*t*), or (2) kept the goods until the lapse of the prescribed or a reasonable time without returning them, or (3) made return impossible by his own act or default, as by letting the goods be destroyed or spoilt (*u*). Where goods have been delivered by a person on "sale for cash or return within a week" and two days after such delivery execution is levied against such person on behalf of his creditors, it cannot be said that the party has detained such goods and therefore the property has passed to him (*v*).

Risk of loss and damage.—Accordingly it is at the original owner's risk if the subject-matter perishes by inevitable accident, *e.g.*, a horse delivered on sale or return, dies before the expiration of the time allowed for return (*w*), unless the accident is due to a defect for which the provisional purchaser is answerable by the special contract or otherwise. Fraud or negligence of a third person to whom the goods are entrusted by the provisional purchaser reasonably and for a proper purpose, and who, for example, sells or pledges them as his own or loses them, has the effect, in the absence of special agreement, of passing the property, if, by reason of the fraud or negligence of the third person, the provisional purchaser is unable to return them (*x*). Intervening damage which only depreciates the goods without the holder's fault, such as an accident to a horse while being tried, does not generally affect the right to return them (*y*). The cases are not altogether easy to reconcile, but the present statement of their actual effect is believed to be correct.

Reputed ownership.—Where it is the notorious custom of a particular trade for dealers to hold goods on sale or return, a person so holding anything in the way of that trade is not a reputed owner under the English bankruptcy law, nor does he become so by selling, or endeavouring to sell the goods, that being the purpose for which he holds them. In deciding this the late Sir G. Jessel incidentally stated the legal effect of the transaction (*z*). "He (a man who has goods sent to him on sale or return) receives the goods from the true owner with an option of becoming the owner, which

(*t*) As to pledging them, see *Kirkham v. Attenborough*, example (1), *supra*. Any act which is consistent only with his being the purchaser has the same effect: per Lord Esher, M.R., (1897) 1 Q. B. at p. 203.

(*u*) Authorities are considered in *Ray v. Barker* (1879) 4 Ex. Div. 279, C. A.; *Elphick v. Barnes* (1880) 5 C. P. D. 321; *Chapman v. Withers* (1888) 20 Q. B. D. 324; *Weiner v. Gill* (1906) 2 K. B. 574, C. A.; *Genn v. Winkel*, *supra*, example (2).

(*v*) *In re Ferrier* (1944) 1 Ch. 295.

(*w*) *Elphick v. Barnes*, *supra*.

(*x*) Some *dicta* of Cotton, L. J., in *Ray v. Barker*, *supra*, indicate a different opinion. The *dicta* of Bramwell and Brett, L.J.J., are strongly in the other direction. The case is really a decision on a technical point of procedure and so cannot be considered as affecting the authority of *Elphick v. Barnes*, which is a considered decision of Denman, J. This view is further confirmed by *Genn v. Winkel*, *supra*, example (2).

(*y*) *Head v. Tattersall* (1871) L.R. 7 Ex. 7.

(*z*) *Ex parte Wingfield* (1879) 10 Ch. D. 591, at p. 593, C. A.

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can be exercised in one of three ways—by buying the goods at the price named by the vendor; by selling (or pledging) (a) the goods to someone else, which is taken to be a declaration of his option, or by keeping them so long that it would be unreasonable that he should return them.”

Intention of the parties must prevail.—It must be remembered that all rules of this kind are subject to the intention of the parties, who may vary the ordinary terms of sale or return, or add special conditions or warranties. Express terms, if any there be, must be carefully considered in every case. If the parties express in terms their intention as to when the property is to pass, the Court will construe the contract according to such intention. Where the plaintiff delivered goods on sale or return with a memorandum in writing that they were to remain his property “until settled for or charged,” and the goods were pawned with the defendant by a fraudulent person, who had obtained possession from the provisional purchaser, and there was no settlement with or charge by the plaintiff, it was held that the property had not passed from the plaintiff (b). The term “jangad” does not mean sale or return, and when goods are entrusted on “jangad” it means that the goods are to be shown for approval. A purchaser, therefore, does not obtain a good title from a broker who has received goods on “jangad” terms unless the consent of the owner has been obtained (c).

Delivery on sale or return and conditional sale.—It is not always easy to distinguish a transaction of sale or return from a conditional sale in which the property passes at once subject to the buyer's option to return the goods if some prescribed condition is not fulfilled. Analogy, however, is sufficient to make such cases of conditional sale instructive and, to some extent, applicable in cases of sale or return (d). Indeed, in many instances, when the question arises between the immediate parties, it may be unnecessary to decide to which class a given case belongs, but where the rights of third parties come in question, the matter is of considerable importance, for when goods are delivered under a contract of bailment, which is what delivery of goods on sale or return is, whatever special stipulations the contract may contain, the deliverer does not hold them under an agreement of sale at all, and cannot, therefore, pass the

(a) *Kirkham v. Attenborough*, *supra*; *London Jewellers, Ltd. v. Attenborough* (1934) 2 K. B. 206; *In re Ferrier* (1944) 1 Ch. 295.

(b) *Weiner v. Gill* (1905) 2 K. B. 172, (1906) 2 K. B. 574, C. A.; cf. *Edwardes v. Vaughan* (1910) 26 T. L. R. 545, C. A. In *Weiner v. Harris* (1910) 1 K. B. 285, C. A. a transaction called “sale or return” was held on the whole to amount to an agency for sale, giving the holder of the goods the authority of a mercantile

agent under the English Factors' Act, 1889.

(c) *Amritlal v. Bhagwandas* (1939) Bom. 454, 186 I. C. 8, ('39) A. B. 435.

(d) *Head v. Tattersall* (1871) L. R. 7 Ex. 7 and *Chapman v. Withers* (1888) 20 Q. B. D. 824, seem to be real examples of conditional sale. Sir M. Chalmers appears to take the same view. The editors of Benjamin on Sale treat them as cases of sale or return, but this makes it very difficult to classify the so-called warranty.

property even to a person who buys from him in good faith, unless by the very act of selling he becomes the buyer from the original owner : whereas if he holds the goods under an agreement to sell, which includes a conditional sale, he may do so, even though the property has not yet passed to him (e).

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25. (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

Examples.—The section may be illustrated by the following examples.

(1) Certain iron, part of a larger quantity, was delivered under contract which provided that certain bills outstanding against the plaintiff should be taken out of circulation by the defendant. The defendant failed to withdraw the bills. The plaintiff therefore stopped further deliveries and brought trover for the iron already delivered. It was held that, as the contract and delivery were conditional on the withdrawal of the bills, the property in the iron had not passed to the defendant, and consequently the action lay (f).

(e) Contrast <i>Edwards v. Vaughan</i>, <i>supra</i>, with <i>Marten v. Whale</i> (1917) 2 K. B. 480, C. A. and see S. 30 and notes thereto. See too <i>Kempler v.</i>	<i>Bravingtons, Ltd.</i> (1925) 133 L. T. 680, C. A. (f) <i>Bishop v. Skillico</i> (1819) 2 B. & Ald. 329 (n), 20 R. R. 457 (n).
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(2) Sale of 100 bags of coffee. The sellers drew a bill of exchange upon the buyer, payable to their order, and endorsed it to the plaintiff, and annexed to it the bill of lading with an endorsement upon it making the coffee deliverable to the buyer if he accepted the bill of exchange and paid it and if not, to the holder of the latter. The buyer accepted the bill of exchange and detached it from the bill of lading, which he endorsed for value to the defendant, but did not pay the bill of exchange. The property did not pass to the buyer, and the endorsee of the bill of exchange successfully maintained trover for the coffee against the endorsee of the bill of lading, to whom the coffee had been delivered (g).

(3) Sale of a cargo of umber shipped by the sellers on board a ship chartered by the buyer. The sellers took bills of lading making the cargo deliverable to order or assigns, and drew a bill of exchange on the buyer for the price which they discounted with their bankers, handing over to them the bills of lading to be given up to the buyer upon his accepting and paying the bill of exchange. The buyer at first declined to meet the bill, but subsequently tendered the amount for which it was drawn and demanded the bills of lading. The bank refused to accept the tender and sold the cargo. *Held*, that the property passed to the buyer on tender of the amount of the bill, and that he could maintain trover against the bank for the wrongful sale of the cargo (h).

(4) Sale by American shippers of a quantity of wheat c.i.f. to German buyers, payment to be made by cheque against documents. The sellers drew a bill for the price which they discounted with their bankers and handed to them the bill of lading generally endorsed and the certificate of insurance, to be delivered to the buyers on their payment through a Berlin bank of the bill of exchange. Before the documents were tendered to the buyers, and before payment of the bill of exchange, the ship was seized as enemy property. *Held*, that the wheat remained the property of the American sellers (i).

(5) Sale of a quantity of cotton. The invoice was made out as shipped on account of and at the risk of the buyer, but the bill of lading was taken deliverable to the order of the seller. The bill of lading, endorsed in blank, with a bill of exchange attached, was sent to the buyer by the seller's agent, who requested the buyer's protection to the draft. The buyer retained the bill of lading but returned the bill of exchange unaccepted on the ground that the buyer's orders had not been complied with. *Held*, that the property in the cotton had not passed to the buyer (j).

(g) *Barrow v. Coles* (1811) 3 Camp. 92, 13 R. R. 763.

(h) *Mirabita v. The Imperial Ottoman Bank* (1878) 3 Ex. Div. 164, C. A. Compare *The Prinz Adalbert* (1917) A. C. 586, P. C.

(i) *The Miramichi* (1915) P. 71.

Compare *The Derfflinger* (No. 2) (1918) 118 L. T. 521, P. C.

(j) *Shepherd v. Harrison* (1871) L. R. 5. H. L. 116. Compare *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899) 1 Q. B. 643, C. A.

(6) Sale of a piano to be delivered at the premises of a packer on behalf of the buyer and to be paid for in ready money. The seller's servant took it to the packer's premises, but the buyer having given no instructions as to payment to the packer, left it with the packer on the express condition that it was not to be delivered to the buyer except on payment. The packer subsequently delivered it to the buyer without payment. *Held*, that the property had not passed to the buyer, and that the seller could maintain trover against the packer (*k*).

Reservation of the right of disposal.—It has been seen that, generally speaking, it is to the advantage of the seller that the property should pass at the earliest possible moment: none the less, in any given case he may well think that it serves his interests better to retain ownership of the goods until some later period, until, for instance, the price is paid, or a bill of exchange accepted. If he clearly manifests this intention, the law will give effect to it, and the operation of the rules laid down in the previous sections relating to the passing of the property will, in consequence, be excluded. The seller's intention will not be defeated by the mere fact that he has parted with the possession of the goods, whether to the buyer himself or to some carrier or other bailee for the purpose of transmission to the buyer.

Sub-section (1) is quite general in its terms, and applies to contracts for the sale of specific goods (*l*), as well as to the subsequent appropriation of goods to a contract for the sale of unascertained goods and to contracts which do not involve sea transit (*m*), as well as those which do. It would appear, therefore, that a seller who consigns goods by rail may, under this sub-section, effectively reserve to himself the right of disposal of the goods by taking a railway receipt making the goods deliverable to his own order and retaining it: and the opinion expressed to the contrary in a recent case decided under the Indian Contract Act is no longer law (*n*).

Seller taking the bill of lading to his own order.—Sub-section (2) is based upon the difference in the legal effect of delivering goods to a carrier on the one hand, and on board ship to be carried under a bill of lading on the other. The distinction is clearly pointed out by the late

(*k*) *Loes hman v. Williams* (1815) 4 Camp. 181, 16 R. R. 772.

(*l*) See examples (2) and (6), and also *Brandt v. Bowlby* (1831) 2 B. & Ad. 932, 36 R. R. 796.

(*m*) See examples (1) and (6), and also *Godts v. Rose* (1855) 17 C. B. 229, 104 R. R. 668.

(*n*) *Deoraj v. Munshi Ram* (1926) 48 All. 622, 96 I. C. 130, ('26) A. A. 679.

The opinion so expressed was not necessary for the decision of the case, as the Court found that the relation between the parties was that of principal and agent, not buyer and seller. See also *Harilal Chimanlal v. Pehladrail & Co.* (1929) 31 Bom. L. R. 508, 120 I. C. 337, ('29) A. B. 260, which does not appear quite consistent with this opinion.

Mr. Benjamin in his treatise on sale in a statement which has become authoritative in England by high judicial approval.

"Where goods are delivered by the seller in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive it, and the delivery to him being equivalent to a delivery to the buyer.

"Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the seller is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried" (o).

The seller, therefore, may take the bill of lading to his own order. This last named transaction is very common, and its effect is to control the possession of the captain and make the captain accountable to deliver the goods to the seller as the holder of the bill of lading. The bill of lading is the symbol of property, and by so taking the bill of lading the seller keeps to himself the right of dealing with property shipped and also the right of demanding possession from the captain, and this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer (p).

It may be that the seller commits a breach of contract by thus reserving the right of disposal; but this will not cause the property to pass: for the failure on the seller's part to satisfy the conditions required for ascertaining and appropriating the goods contracted for cannot be remedied in the buyer's favour by construction of law on the ground that the seller ought to have done what he did not. Where a seller in effect refuses to appropriate a particular cargo to the contract by taking bills of lading to the order of a real or fictitious nominee of his own, his conduct may be a breach of contract in the circumstances, but property in that cargo will none the more be transferred for that reason (q). It must be observed also that an unsuccessful attempt by a seller to appropriate a cargo to the contract will not prevent him from appropriating another cargo, and insisting upon the buyer accepting it, if he can do so in accordance with the terms of the contract as to time and otherwise (r).

Shipment without reservation of right of disposal.—On the other hand, if the seller takes out bills of lading which make the goods

(o) Benjamin on Sale, Book II, Chap. VI *ad fin.*, (p. 410, 7th ed.), adopted by Lord Chelmsford in *Shepherd v. Harrison*, *supra*, example (5), at page 127. The whole series of rules propounded in the continuation of the passage may be profitably consulted.

(p) *Shepherd v. Harrison*, *supra*, per Lord Westbury, at p. 128.

(q) *Gabarron v. Kreeft* (1875) L. R. 10 Ex. 274.

(r) *Borrowman v. Free* (1878) 4 Q. B. D. 500. The tender of the first cargo had been found invalid by an arbitrator, whose decision the C. A. obviously thought wrong, but no question of its correctness was before them.

deliverable to the buyer's order, this is a strong confirmation of the normal presumption that delivery to a carrier, and especially a shipmaster, passes the property. "We conceive it is perfectly settled," said the Court of Appeal in England, in 1876, "that if a consignor in such a case wishes to prevent the property in the goods and the right to deal with the goods whilst at sea from passing to the consignee, he must, by the bill of lading, make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods *in transitu* (s), but subject to that right the property in the goods and the right to the possession of the goods is in the consignee. . . . (In *Shepherd v. Harrison*) (t) the consignor did take the precaution of making the goods deliverable to his own order, and of forwarding the endorsed bill of lading, together with the bill of exchange, to an agent of his own. The agent forwarded the bill of lading and the bill of exchange in the same letter to the consignee, and requested him to accept the bill of exchange and return it. Under these circumstances it was held by the House of Lords that the consignee had no right to keep the bill of lading without accepting the bill of exchange. This case is no authority for holding that, if the property in the goods had already passed, the property would revert on the bills of exchange being refused acceptance" (u).

Seller retaining lien only.—There may, however, be an intermediate case, in which the seller intends so to appropriate the goods on shipment as to pass the property, yet deals with the bill of lading in such a way as to prevent the buyer obtaining possession of the goods without paying, or accepting a bill of exchange in payment of the price. In such a case the property will pass, subject to the seller's lien for the price. Thus, where a seller shipped goods under a f.o.b. contract, by the terms of which the buyer was, on delivery of the bill of lading, to accept a bill of exchange for the price payable three months after date, the date being the date of the shipment of the goods, and on shipment took the bill of lading to shipper's order and specially endorsed it to the buyer, and sent it, together with the invoice and bill of exchange duly drawn on the buyer, to the seller's broker, through whom the sale had been effected, and the latter left the documents with the buyer, it was held that the property in the goods passed on shipment, and the buyer was liable for the price, although the goods had been lost on the voyage and before the buyer received the documents, and he refused to accept the bill of exchange on that ground (v).

(s) As to this see sections 50-52 below.

(t) *Supra*, example (5).

(u) *Ex parte Banner* (1876) 2 Ch. Div. 278, 288, 289. Sub-section (3) is based upon the law as declared in *Shepherd v. Harrison* (see per Lord Cairns, at pp. 132-133) and this qualification must

therefore be borne in mind.

(v) *Browne v. Hare* (1858) 27 L. J. Ex. 372, 117 R. R. 811 (a better and fuller report than 3 H. & N. 484) affirmed 4 H. & N. 822, 118 R. R. 786. See also *Jenkyns v. Brown* (1849) 14 Q. B. 496, 80 R. R. 287.

Whether this be the effect of the transaction is a question of fact in each case: in the above instance the inference that it was, and that the property had passed to the buyer on shipment, was readily drawn, as the seller throughout had been acting in strict accordance with the contract.

Judicial expositions of the rule.—The following lucid statement of the rules as to appropriation was judicially delivered by the late Lord Justice Cotton in 1878, and the provisions of the English Act, which are reproduced by sections 23 and 25 of the Act were, it is well known, based upon this judgment:—

“ Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself the power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait v. Baker* (w), *Ellershaw v. Magniac* (x), and *Gabarron v. Kreeft* (y), (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so

(w) (1848) 2 Ex. 1, 76 R. R. 469.

(x) (1843) 6 Ex. 570 n, 86 R. R. 398 n (form of bill of lading held

conclusive in absence of contrary indication).

(y) (1875) L. R. 10 Ex. 274.

it was decided in *Turner v. Trustees of Liverpool Docks* (z), *Shepherd v. Harrison* (a), *Ogg v. Shuter* (b). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser" (c).

In this case, accordingly, where the bills of lading had been handed to the bankers who discounted the bill of exchange drawn against the cargo, and this was done only to secure payment of the bill of exchange at maturity, it was held that the buyer was entitled to the goods on offering to pay the bill of exchange, and that his tender constituted a final appropriation vesting the property in him.

The following passage from the judgment of the Judicial Committee, delivered by Lord Parker, lays down the principles as follows:

"The English cases, however, on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract: *Wait v. Baker* (d); *Gabarron v. Kreeft* (e). This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by the appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part

(z) (1851) 6 Ex. 543, 86 R. R. 377, Ex. Ch. The facts here were somewhat complicated, but the main point is that the fact of goods being shipped on the buyer's ship does not prevail over the terms of a bill of lading made out to the seller's order.

(a) (1869-1871) L. R. 4 Q. B. 196, 5 H. L. 116.

(b) (1875) 1 C. P. Div. 47 (effect of

bill of lading to shipper's order is to reserve right not only of possession, but of disposal of the goods as against a buyer in default).

(c) Per Cotton, L. J., *Mirabita v. Imperial Ottoman Bank*, *supra*, example (3), at pp. 172-173.

(d) (1848) 2 Ex. 1, 76 R. R. 469.

(e) (1875) L. R. 10 Ex. 274.

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of the contract: *Mirabita v. Imperial Ottoman Bank* (f); *Van Casteel v. Booker* (g); *Browne v. Hare* (h); *Joyce v. Swann* (i). The *prima facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case.

“Having regard to the doctrine that the master of a ship who gives to the shipper of goods a bill of lading becomes bailee of the goods to the person indicated by the bill of lading, a seller holding a bill of lading to his order would have a sufficient possession of the goods to maintain his lien, even if he had on shipment parted with the property. The seller in such a case makes the ship (even if it belongs to the buyer or is chartered by him) his warehouse so far as these goods are concerned, and the case, as pointed out by Pollock, C.B., in *Browne v. Hare* (j), is to be governed by the same rules as that of a person contracting to buy goods from warehouse of the seller where they are to remain until paid for, so that the seller retains a lien. They may or may not become the buyer's property before he pays for them, according to the terms of the contract” (k).

The rules as to delivery to a carrier have been re-stated as follows by the Bombay High Court (l):—

- (1) In the case of such a contract (i.e., a contract for the sale of unascertained goods), the delivery by the vendor to a common carrier or, unless the effect of the shipment is restricted by the terms of the bill of lading, a shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property.
- (2) If, however, the vendor when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser.

(f) (1878) 3 Ex. Div. 164.

(g) (1848) 2 Ex. 691.

(h) *Supra* note (v), p. 115.

(i) *Infra* note (o), p. 120.

(j) *Supra* note (v), p. 115.

(k) *The Parchim* *infra* note (p), p. 120, (1918) A. C. 157, pp. 170-171.

(l) *Ford Automobiles v. Delhi Motor Co.* (1922) 24 Bom. L. R. 1140, 70 I. C. 138, ('23) A. B. 125. Followed, *Gulab Rai-Sagar v. Nirbhe Ram-Nagar* (1923) 4 Lah. 423, 79 I. C. 194, ('24) A. L. 239; *Governor-General in Council v. Joynarain* (1948) A. P. 36.

- (3) If the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser.
- (4) If the seller discounts a draft upon the buyer with a bank and authorizes the bank to hand to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the seller intends to transfer the ownership when the draft is accepted, but intends also to remain the owner until this has been done.

General summary.—It may be stated on the whole, in a summary way, that generally delivery to a carrier or bailee who receives the goods for transmission to the buyer appropriates those goods to the contract; but the seller may exclude the operation of this rule by reserving the power of disposal. In particular the appropriation may be and constantly is made conditional on payment or tender of the price (*m*), or acceptance of a bill of exchange; this last is quite a common practice. In such cases the property passes only when the condition is satisfied. The fact of the seller taking a bill of lading to his own order is strong evidence that the appropriation is conditional, whether he keeps it himself or sends it endorsed in blank to his agent, with instructions to the agent not to part with it until the goods are paid for or the bill accepted (*n*). Indeed, the rule that such is the legal effect, is quite as definite and important as the primary rule as to the effect of unconditional delivery; and the use of this precaution by the seller throws on the buyer the burden of showing that the appropriation was intended to be final. This can be shown, for example, if the result of the circumstances and course of dealing of the parties is that the sellers took the bill of lading in their own name only because they were not quite sure of the construction of the buyer's acceptance of their offer, whereas in fact he did

(*m*) For a case of conditional appropriation in dealing with goods on land, see *Godts v. Rose* (1855) 17 C. B. 229, 104 R. R. 668.

(*n*) *Bank of Morvi, Ltd. v. Baerlein Bros.* (1923) 48 Bom. 374, 79 I. C. 1012, ('24) A. B. 325; *Re Cargo ex s.s.*

Rappenfels (1915) 42 Cal. 334, 30 I. C. 174; *Mehla & Co. v. Joseph Heurreux* (1924) 48 Bom. 531, 80 I. C. 766, ('24) A. B. 422; *Bal Kishan-Basheshar Nath v. S. M. Fazal Elahi* (1926) 8 Lah. 173, 102 I. C. 807, ('27) A. L. 391.

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mean to accept the cargo, and acted accordingly (o), or that the seller merely intended to retain his lien. The incidence of the risk as between buyer and seller is a very strong indication as to which of them owns the property (p).

It should be noted that, in case of difference, the terms of the bill of lading prevail over those of an invoice, and, it seems (q), over any inference from ambiguous terms in any other documents evidencing the contract. "It is perfectly well settled that . . . the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading" (r).

Attention to the principles established under the present head will be found to remove many of the difficulties which arise on the more special question of an unpaid seller's right to stop goods in transit.

Goods ordered by tradesmen in India from Europe.—The following passage from Mr. Benjamin's treatise (s) indicates at what stage property in goods shipped from Europe to India may pass to the Indian firm ordering the goods :—

"If *A* in Bombay orders goods from *B* in Liverpool without sending the money for them, *B* may execute the order in one of two modes, without assuming risk. *B* may take the bill of lading, making the goods deliverable to his own order or that of his agent in Bombay, and send it to his agent, with instructions not to transfer it to *A* except on payment for the goods. Or *B* may draw a bill of exchange for the price of the goods on *A*, and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to *A* on due payment of the bill of exchange. Now in both these modes of doing business, it is impossible to infer that *B* had the least idea of passing the property to *A*, at the time of appropriating the goods to the contract. So that although he may write to *A* and specify the packages and marks identifying the goods, and although he may accompany this with an invoice, stating that these specific goods are shipped for *A*'s account, and in accordance with *A*'s order, making his

(o) *Joyce v. Swann* (1864) 17 C. B. N. S. 84. There was no question between the parties to the sale, but only between the buyer and underwriters as to insurable interest, the cargo having been lost by wreck.

(p) *The Parchim* (1918) A. C. 157 (the main point is on the law to be applied by the Prize Court), and see

The Kronprinsessan Margareta (1921) 1 A. C. 486.

(q) See *Ogg v. Shuter* (1875) 1 C. P. D. 47.

(r) Lord Cairns in *Shepherd v. Harrison* (1871) L. R. 5 H. L., at p. 131.

(s) P. 383, cited with approval in *Re Cargo ex s.s. Rappenfels* (1915) 42 Cal. 334, 342-3, 30 I. C. 174.

election final and determinate, the property in the goods will nevertheless remain in *B*, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to *A*. And a third course is now, under the Act (*t*), available to the seller. He may draw upon the buyer a bill of exchange for the price, and may send it, together with the bill of lading, *direct* to him. In such a case, however, he trusts the buyer. In this class of case, it is often a matter of great nicety to determine whether or not the seller's intention was really to reserve a right of disposal."

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26. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not :

Risk *prima facie*
passes with property.

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault :

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

Examples.—The section may be illustrated by the following examples :—

(1) Goods in a house held on lease were sold by auction under conditions expressly providing that all lots should be taken to be delivered at the fall of the hammer, after which time they should remain at the exclusive risk of the purchaser. The rent of the house was in arrear, and after the sale the landlord threatened to distrain on these goods, and to prevent distress the auctioneer paid the rent and paid over the net proceeds of the sale only to the original owner of the goods, who was also the tenant of the house. It was held that the auctioneer had no right to make this deduction as the property in the goods had passed to the respective buyers and the seller, therefore, had no further interest in them, and the auctioneer, in consequence, had no implied authority from him to pay the rent in order to save the goods from distress (*u*).

(2) The defendant purchased 975 bales of rice, being the whole contents of a gola, paid earnest money, and took part delivery of the rice.

(*t*) S. 25 (3), (s. 19 (3) of the English Act).

(*u*) *Sweeting v. Turner* (1871) L. R. 7 Q. B. 310.

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The rest was destroyed by fire. The property in the whole had passed to him and he was held liable to pay the balance of the price (v).

(3) The defendant contracted to purchase 30 tons of apple juice. The plaintiff crushed the apples, put the juice in casks and kept it pending delivery. The defendant delayed taking delivery and the juice went putrid and had to be thrown away. The defendant was liable to pay the price. If the seller had been in a position to sell the goods elsewhere and acquire other goods for the postponed time of delivery and he had not done so and there was some loss in the meantime, the responsibility for the loss would have fallen on him, but in the present case the seller had to keep the goods ready for delivery as and when the buyer proposed to take them (w).

Risk usually follows the property.—As in our law property can be transferred by the contract itself, subject to the goods being ascertained, it is natural to hold that, in the absence of special terms, the risk follows the property (x). "It is thoroughly established that by the English law, where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser although the vendor still retains his lien, the price of the goods not having been paid (y); and any accident happening to the things subsequently, unless it is caused by the fault of the vendor, ... must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor" (z). But it might have been held that property is transferred only by delivery, and nevertheless the contract is effectual to change the risk independently of delivery; this would make an exception to the general rule that risk accompanies ownership. Such is in fact the law of various countries and was the law of Scotland before the passing of the English Act (a). There is nothing in the law of England, however, to prevent parties from agreeing, if they please, that the risk shall pass at some time or on some condition which is not necessarily simultaneous with the passing of the property, and thus ownership may in particular cases be separated from the risk (b), but that this may be so, it is necessary

(v) *Shoshi Mohun Pal v. Nobo Krishto Poddar* (1878) 4 Cal. 801.

(w) *Demby Hamilton & Co., Ltd. v. Barden (Endeavour Wines, Ltd.)* (1949) 1 All. E. R. 435.

(x) See examples to the preceding sections.

(y) See ss. 46-48 *post*.

(z) *Sweeting v. Turner*, *supra*, example (1), at p. 313, per Blackburn, J.; cf. *Black v. Homersham* (1878) 4 Ex. Div. 24 (dividend on shares).

(a) See Chalmers, pp. 68-69.

(b) *Martineau v. Kitching* (1872) L. R. 7 Q. B. 436, a peculiar case where the majority of the Court thought it immaterial whether property had passed or not, the risk having passed to the buyer by the terms of the contract. See also *Castle v. Playford* (1872) L. R. 7 Ex. 98; *Anderson v. Morice* (1875) L. R. 10 C. P. 609, 1 App. Cas. 713, and *Sterns, Ltd. v. Vickers, Ltd.* (1923) 1 K. B. 78, C. A. The risk may pass by custom; *Bevington v. Dale* (1902) 7 Com. Cas. 112.

that there should be some appropriation of the property to the contract (c). The possibility of such being the contract between the parties has been thus expressed by Lord Hatherley :—" It is perfectly conceivable, indeed in many cases it has been so as a matter of fact, that a person selling some goods at a distant place to a person living in this country, may say, ' I am perfectly willing to sell you these goods ; I am perfectly willing to complete the cargo so to be sold, but I do not intend to be at the risk of their loss during the transit or on the voyage, and although you will not be expected to pay for the goods and acquire the property until you have the bills and the documents attached sent to you, still in the meantime there will be a risk in transit, and that is a risk which I am not desirous of undertaking, and I must throw that risk upon you as part of our bargain ' " (d).

Goods at seller's risk.—It must be remembered that under section 8 a seller of goods which remain in his custody before the property has passed is relieved from liability if they are accidentally destroyed without his fault ; and if the property has passed and the goods remain in the possession of the seller and are accidentally destroyed without his fault, he again is not liable to an action for a breach of contract in not delivering them.

Immovable property.—As to immovable property, it is provided by the Transfer of Property Act, that where the ownership of the property has passed to the buyer, he is bound to bear any loss arising from destruction, injury or decrease in value of the property not caused by the seller, (s. 55 (5) (c)) but a mere contract for the sale of immovable property does not of itself create any interest in or charge on the property (s. 54). See also the Specific Relief Act, section 13.

Bailees.—The rights and liabilities of bailees are dealt with in sections 148-181 of the Indian Contract Act (e).

Transfer of Title.

27. Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner,

Sale by person not
the owner.

(c) *Billimoria v. Gauri Mal-Narain Das* (1928) 10 Lah. L. J. 290, 112 I. C. 457, ('28) A. L. 481.

(d) *Anderson v. Morice*, 1 App. Cas., at pp. 728, 729.

(e) See Pollock and Mulla, pp. 484-529,

and cf. *Head v. Tattersall* (1871) L. R. 7 Ex. 7; *Elphick v. Barnes* (1880) 5 C. P. D. 321; *Wiehe v. Dennis Brothers* (1913) 29 T. L. R. 250; *Shaw v. Symmons & Sons* (1917) 1 K. B. 799.

3. 27 the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Examples.— The section may be illustrated by the following examples :—

(1) *A* finds a ring and after making reasonable efforts to discover the owner, sells it to *B*, who buys without knowledge that *A* was merely a finder. The true owner may recover the ring from *B* (*f*).

(2) Delivery by *A* of goods on sale or return to *B*, upon the condition that they are to remain the property of *A* until paid for. *B* sells them to *C*, without paying *A* for them. *C* buys in good faith and without notice of *A*'s title. None the less, *A* can recover the goods or their value from *C* (*g*).

(3) Sale of a horse at a public auction. Unknown to the auctioneer and the buyer, the horse had been stolen. The buyer obtains no title against the true owner (*h*).

(3a) The owner of a motor bus engaged *A* to ply his bus for hire. The owner handed a letter to *A* to be delivered to the Magistrate so as to obtain a permit for hiring the car. *A* fraudulently altered the letter into one addressed to the District Superintendent of Police requesting him to transfer the registration in his (the hirer's) name, and after this was done he sold the bus to a stranger. The buyer does not obtain any title against the true owner (*i*).

(4) *A* assigned goods to the plaintiff by bill of sale, but was allowed to keep possession of them upon payment of a weekly rent, and an

(*f*) *Farquharson Bros. v. King & Co.* (1902) A. C. 325, at pp. 335-336 ; cf. *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899) 1 Q. B. 643, at p. 658, C. A.

(*g*) *Edwards v. Vaughan* (1910) 26 T. L. R. 545, C. A. ; cf. *Khitish Chandra v.*

Emperor (1924) 51 Cal. 796, 801, 82 I. C. 163, ('24) A. C. 816.

(*h*) *Lee v. Bayes* (1856) 18 C. B. 599, 107 R. R. 424.

(*i*) *Mohambaram v. Ram Narayan* (1935) 69 M. L. J. 691, 158 I. C. 535, ('35) A. M. 850.

undertaking to deliver them up on demand. He subsequently sold them to the defendant. The defendant, though he bought in good faith, acquired no title against the plaintiff (*j*).

(5) The hirer of goods under a hire purchase agreement sells them. The buyer from him, though acting in good faith, does not acquire the property in the goods as against the owner, but, at the most such interest as the hirer had (*k*).

(6) One Alfred Blenkarn, writing from an address which he gave as 37, Wood Street, Cheapside, and signing his name so that it looked like Blenkiron & Co., ordered some goods from the plaintiffs. At 123, Wood Street, were premises of a reputable firm, W. Blenkiron & Co. The plaintiffs consigned the goods to Messrs. Blenkiron & Co., 37, Wood Street, and Blenkarn obtained possession of them and re-sold to the defendants, who bought in good faith. The defendants acquired no title as against the plaintiffs (*l*).

(7) *A* by falsely representing that he is authorized by *B* to purchase and take delivery of goods on *B*'s behalf, obtains possession of the goods from *C*. He re-sells them to *D*. *D* acquires no title as against *C* (*m*).

(8) *A* by falsely representing to the sellers of goods that he had bought them from the buyers, obtains possession of the goods. He can give no title to a buyer from him (*n*).

(9) The plaintiff entrusted a motor car to a mercantile agent for sale, stipulating that the car should not be sold below a certain price. To this the agent professed to agree, but intended, from the outset, to sell the car at such price as he could obtain and to misappropriate the proceeds. He sold it to *A*, who bought in good faith, for less than the stipulated price and absconded. Subsequently *A* sold the car to the defendant. The plaintiff failed in his action to recover the car from the defendant (*o*).

(10) *A* consigned a quantity of cocoa to *B* by railway, and sent the consignment notes to him. The price, at the time, had not been agreed. Before any agreement was arrived at as to the price, *B* sold the cocoa to

(*j*) *Cooper v. Willomatt* (1845) 1 C. B. 672, 68 R. R. 798.

(*k*) *Helby v. Matthews* (1895) A. C. 471; *Belsize Motor Supply Co. v. Cox* (1914) 1 K. B. 244; *Whiteley & Co. v. Hill* (1918) 2 K. B. 808, C. A.; *Greenwood v. Holquette* (1873) 12 B. L. R. 42.

(*l*) *Cundy v. Lindsay* (1878) 3 App.

Cas. 459. Compare *Hardman v. Botho* (1863) 1 H. & C. 803, 130 R. R. 784.

(*m*) *Higsons v. Burton* (1857) 26 L. J. Ex. 342, 112 R. R. 938.

(*n*) *Kingsford v. Merry* (1856) 1 H. & N. 503, 108 R. R. 694, Ex. Ch.

(*o*) *Folkes v. King* (1923) 1 K. B. 282, C.A.

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C and handed to him the consignment notes. *A* was held to be precluded from disputing *B*'s title to the cocoa (*p*).

Transfer of title.—Sections 27-30 supersede section 108 of the Indian Contract Act, and, while they deal with the same subject matter, do so in a manner which resembles the English law much more closely than it resembles the provisions of that section, which differed from the English law in many respects. English authorities, therefore, which turn on the construction of the English enactments on this subject now in force, that is to say the Factors Act, 1889, and section 25 of the Sale of Goods Act, 1893, will be of more use under this Act than they were under section 108 of the Indian Contract Act, and even than many of the Indian cases under that section (*q*).

There has always been a conflict between the legal and mercantile view; the law insisting upon the rights of the true owner of goods and refusing to allow him to be deprived of them unless he was in some kind of manner responsible for his own loss, while the merchant has sought to protect the honest buyer of goods, or lender of money upon them, who deals with the person in possession of the goods. The triumph of the mercantile view is to be seen in the law relating to the purchase of goods in market overt, by which the honest buyer obtained an indefeasible title to the goods; and this rule of the law merchant became part of the common law, modified, however, in the reign of Henry VIII by the statutory provision that if the goods were stolen the property reverted in the true owner on the thief being prosecuted to conviction. The law of market overt, however, has long ceased to be of any general importance in England (*r*) and as it does not exist in India no more need be said about it. In addition to this two other exceptions were recognized by the common law to the rule enunciated in section 27, that a man cannot give a better title to goods than he has himself (*s*): *first*, the case of sale by a person holding under a contract voidable for fraud or the like at the other party's option—here, the transaction being valid until rescinded, a third person purchasing in good faith and for value gets an indefeasible title; *secondly*, “where

(*p*) *Commonwealth Trust, Ltd. v. Akotey* (1926) A. C. 72, P. C.

(*q*) See *Shankar v. Mohanlal* (1887) 11 Bom. 704; *Franji v. McGregor* (1902) Punj. Rec. No. 27 (a somewhat doubtful authority in any view); *Le Geyt v. Harvey* (1884) 8 Bom. 501; *Seager v. Hukma Kessa* (1900) 24 Bom. 458; *Biddomoye Dabee v. Sittaram* (1878) 4 Cal. 497; *Faiz Ahmad v. King Emperor* (1908) Punj. Rec. Cr. No. 2; *Ramasami Gupta v. Kamalammal* (1921) 45 Mad. 173, 70 I. C. 448, (22) A. M. 44. The reader is referred to Pollock and Mulla, 5th edition, pp. 521-531, for a full

discussion of s. 108 of the Indian Contract Act and the cases decided thereunder.

(*r*) See *Hargreave v. Spink* (1892) 1 Q. B. 25, and judgment of Scrutton, J., in *Clayton v. LeRoy* (1911) 2 K. B., at p. 1038, *et seq.* and Chalmers, pp. 74-75 and 77-79, where further information may be found.

(*s*) See the judgment of Willes, J., in *Fuentes v. Montis* (1868) L. R. 3 C. P., at pp. 276-277 and cf. *Cole v. North Western Bank* (1875) L. R. 10 C. P., at pp. 362-363, judgment of Blackburn, J., in *Ex. Ch.* This judgment also gives the history of the earlier Factors Acts.

an agent who carries on a public business deals with the goods in the ordinary course of it, though he has received secret instructions from the principal to deal with them contrary to the ordinary course of that trade"—here the principal is estopped from repudiating the agent's ostensible authority. But the protection given by this last rule to buyers or lenders in good faith was inadequate, for the possession of goods does not of itself, amount to an ostensible authority to deal with the property (t); and a person whose employment consists in dealing with other men's goods in one way does not, by possessing goods in the course of that employment, acquire ostensible authority to deal with them in any other way (u).

Legislation, however, has from time to time come to the assistance of the mercantile view, with the result that now both in England and India—

(a) Those who having sold goods continue or are in possession of the goods or of the documents of title to the goods (v),

(b) Those who having bought or agreed to buy goods obtain, with the consent of the seller, possession of the goods or the documents of title to the goods (w),

(c) Mercantile agents acting in the ordinary course of business of a mercantile agent who have, with the consent of the owner, possession of the goods or the documents of title to the goods (x), and in India,

(d) Part owners who, with the permission of the co-owners, are in the sole possession of the goods (y) may give a good title to a buyer who buys in good faith and without notice of their want of title.

Persons included in classes (a) and (b) may give a good title whether they act by themselves or a mercantile agent. Pledges by these persons also are expressly validated by the Act, while pledges by mercantile agents are dealt with by section 178 of the Indian Contract Act, as amended by the Indian Contract (Amendment) Act, 1930 (z).

Nemo dat quod non habet.—Section 27 lays down the general proposition that no one can give what he has not got; and if one deals

(t) *Johnson v. Crédit Lyonnais* (1877) 3 C. P. D. 32, at pp. 39-40.

(u) See L. R. 10 C. P., at p. 369.

(v) S. 30 (1).

(w) S. 30 (2).

(x) S. 27. For the definition of mercantile agent see s. 2 (9). The use of the term mercantile agent has been

explained as intended to express in a compendious form the result of the decisions as to who were agents within the meaning of the older Factors Acts; *Oppenheimer v. Attenborough* (1907) 1 K. B. 510, at p. 514, per Channell, J.

(y) S. 28.

(z) See Pollock and Mulla, pp. 520-526.

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with the goods of another without his authority, the transaction is as against that other nugatory in law (a). There are certain exceptions, some of which are more apparent than real, to this rule; a pledgee, for instance, is authorized to sell the pledged article, but he does so as agent for the pledgor to the extent that after paying his debt out of the proceeds he is accountable to the pledgor for any surplus and must in any event treat the proceeds of the sale *pro tanto* in reduction of the debt (b); a sheriff or distrainer may sell the goods of the debtor and give a good title to the buyer; a trustee in bankruptcy may sell not only the goods of the bankrupt but those which are in his reputed ownership; and a mortgagor of goods remaining in possession can give a good title to a buyer from him who acts in good faith and without notice of the encumbrance (c). Another instance is that of an agent of necessity, usually a master of a ship, who may in case of necessity sell the ship or cargo (d), and this has been extended to the case of a carrier by land; but a real necessity must exist for the sale and there must be a practical impossibility of obtaining the owner's instructions in time as to what shall be done (e). Whether this doctrine can be extended beyond the cases of carriers is not certain. The suggestion that it can, which was made by McCardie, J., in *Prager v. Blatspiel* (f), does not appear to have been favourably received by the Court of Appeal (g).

Estoppel.—It may also be that the owner has acted in such a way as to be precluded from disputing the lawfulness of the transaction, that is to say, may be estopped from setting up his title against the buyer. One instance of this is the case already mentioned of the owner giving an agent ostensible authority to deal with his goods in the ordinary course of his business. The estoppel may, however, arise in other ways, as by the owner standing by when the sale is effected (h), still more by his assisting the sale (i), or by permitting "goods to go into the possession of another with all the insignia of possession thereof and apparent title" (j); or if he has otherwise acted or made representations in such a way

(a) *See Hollins v. Fowler* (1875) L. R. 7 H. L. 757.

(b) Indian Contract Act, s. 176. Pollock and Mulla, pp. 518-520.

(c) *Narasiah v. Venkataramiah* (1918) 42 Mad. 59, 47 I. C. 976; *Backer Khorasane v. Ahmed Esmail Jamal* (1927) 5 Ran. 633, 106 I. C. 355, ('28) A. R. 28.

(d) Pollock and Mulla, pp. 543-545.

(e) *Sims & Co. v. Midland Ry.* (1913) 1 K. B. 103, 112; *Springer v. Great Western Railway Co.* (1921) 1 K. B. 257, C. A.

(f) (1924) 1 K. B. 566.

(g) *Jebara v. Ottoman Bank* (1927) 2 K. B. 254, pp. 270-271.

(h) *Gregg v. Wells* (1839) 10 A. & E. 90, 50 R. R. 347.

(i) *Waller v. Drakeford* (1853) 1 E. & B. 749, 93 R. R. 377.

(j) *Commonwealth Trust v. Akotey*, *supra*, example (10); cf. *Zwinger v. Samuda* (1817) 7 Taunt. 265. Contrast *Abdul Vahed Abdul Karim v. Hasanalli Alibhai Ghasia* (1925) 50 Bom. 229, 96 I. C. 305, ('26) A. B. 338 (a registered owner of shares does not, by handing over share certificates and blank transfers signed by him to another person, make a representation to the world that such person is entitled to deal with the shares, so that any honest purchaser from him obtains a good title).

as to induce the buyer to alter his position to his prejudice (*k*). Mere carelessness, however, on the part of the owner of the goods in guarding them will not create an estoppel; it is necessary that the owner should have done some act on which the buyer relied and misled him by that act, or, as it is also put, that the owner should have done some act amounting to a disregard of his obligations towards the person who relies on the negligence as creating an estoppel (*l*). This is a question of fact depending on the particular circumstances of the case.

Sale by mercantile agent.—The important proviso to this section is taken from section 2 (1) of the English Factors Act, 1899; but deals only with the power of a mercantile agent to sell the goods; his power to pledge them (which is also dealt with by the above section in the English Factors Act) being, as already seen, the subject matter of section 178 of the Indian Contract Act. It is to be observed, however, that while the wording of the Factors Act and section 178 of the Indian Contract Act is “where a mercantile agent is with the consent of the owner in possession of goods or *the documents of title to goods*,” in this section the wording is “*a document of title to the goods*.” What the object or the exact effect of this alteration in the phraseology may be is not quite easy to see; and, if the distinction be material, it seems unfortunate that different considerations should apply in the case of a sale and of a pledge respectively by a mercantile agent.

In order that the proviso may apply several conditions are necessary.

(1) *The agent effecting the sale must be a mercantile agent (m)*; a sale by a mere clerk or shopman, for instance, would not be within the proviso (*n*); nor would a sale by a broker who has taken the goods on “jangad” terms (*o*).

(2) *The mercantile agent must be in possession of the goods or the documents of title with the consent of the owner.*

Possession.—Under the English Factors Act, section 1 (2) “a person shall be deemed to be in possession of goods or of the documents of title to goods where the goods or documents are in his actual custody or are

(*k*) *Woodley v. Coventry* (1863) 2 H. & C. 164, 133 R. R. 633; *Knights v. Wiffen* (1870) L. R. 5 Q. B. 660; *Dixon v. Kennaway* (1900) 1 Ch. 833; *Simm v. Anglo-American Telegraph Co.* (1879) 5 Q. B. D. 188, pp. 215-216, C. A.

(*l*) *Farguharson v. King* (1902) A. C. 325; *Heap v. Motorists' Advisory Agency* (1923) 1 K. B. 577, 587; *Union Credit Bank v. Mersey Docks and Harbour Board* (1899) 2 Q. B. 205, C. A. As to estoppel of a bailee see *Pollock and Mulla*, pp. 506-507; *Henderson v.*

Williams (1895) 1 Q. B. 521, C. A.; *Laurie & Morewood v. Dudin* (1926) 1 K. B. 223, C. A.

(*m*) As to who is a mercantile agent see *Lowther v. Harris* (1927) 1 K. B. 393, cited in the note to section 2 (9).

(*n*) cf. *Heap v. Motorists' Advisory Agency, Ltd.*, *supra*, note (1); *Shankar v. Mohanlal* (1887) 11 Bom. 704; *Ramasami Gupta v. Kamalammal* (1921) 45 Mad. 173, 70 I. C. 448, ('22) A. M. 44.

(*o*) *Amritlal v. Bhagwandas* (1939) Bom. 454, 186 I. C. 8, ('39) A. B. 435.

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held by any other person subject to his control or for him or on his behalf," and there would appear to be no reason why under this proviso "possession" should not be given that meaning; for unlike the first exception to the repealed section 108 of the Indian Contract Act the proviso is limited to mercantile agents, and does not refer to the possession of "any person," which rendered it necessary to limit the meaning of possession to one "which is unqualified and not to be restricted otherwise than by the owner giving instructions to the person who has it" (p). The only limitation, which, it appears, ought to be implied, is that the possession should be the possession of a mercantile agent as such; for it would not be reasonable to construe the proviso in such a way as, for instance, to enable an auctioneer to whom a furnished house had been let to give a good title to the furniture if he sold it by auction—a case suggested by way of a *reductio ad absurdum* by Blackburn, J. (q).

Consent obtained by fraud.—The words "with the consent of the owner" present more difficulty. It was held in England under the earlier Factors Act, that where the agent by fraud induced the principal to "entrust" him with the goods or documents of title, the agent could none the less give a good title to a *bona fide* purchaser (r); and these cases are still good law, so that the consent of the owner to the agent's possession is valid, though it may have been obtained by fraud (s), provided, at any rate, that the fraud does not amount to larceny by a trick. Under the corresponding provisions of section 108 of the Indian Contract Act, however, "consent" probably meant "free consent" (t), as defined by section 14 of the Indian Contract Act, and it may be argued that it must be so construed in this section. It is submitted, however, that there is nothing in the present Act to compel such a limited interpretation of "consent," which would certainly destroy much of the value of the proviso from the point of view of the merchant. The difficulty, however, does not end here, for in England there is a tendency

(p) See *Greenwood v. Holquette* (1873) 12 B. L. R. 42, 46; *Roopchand Jankidas v. The National Bank of India* (1918) 46 Cal. 342, 48 I. C. 975; *Singer Manufacturing Co., Lahore v. Niaz Ali* (1919) Punj. Rec. No. 54, 46 I. C. 888; *Ahmed Jan v. Singer Sewing Machine Co.* (1921) 3 Lah. L. J. 249, 67 I. C. 638, (21) A. L. 223; *Shankar v. Lakshmbai* (1928) 30 Bom. L. R. 470, 109 I. C. 737, (28) A. B. 225. But in *Haji Karim v. Central Bank of India* (1928) 56 Cal. 367, 119 I. C. 23, (29) A. C. 497, it was laid down that the word "possession" in s. 108 was to be given the widest possible meaning consistent with the context.

(q) *Cole v. North Western Bank* (1875) L. R. 10 C. P. 354, at p. 373.

(r) *Baines v. Swainson* (1863) 4 B. & S. 270, 129 R. R. 741; *Vickers v. Hertz* (1871) L. R. 2 Sc. App. Cas. 113.

(s) *Lowther v. Harris*, *supra*, approving the above cases; *Cuhn v. Pockett's Bristol Channel Steam Packet Co.*, *infra*, note (w).

(t) In the fifth edition of Pollock and Mulla on the Indian Contract Act, the authors took this view of the meaning of "consent" in the first exception to s. 108 of that Act, which corresponds to this proviso; and considered that as regards cases in which possession is obtained otherwise than by free consent, provision was made by the third exception, which corresponds to s. 29. See Pollock and Mulla (5th Edition), p. 526.

manifesting itself to give a still wider meaning to the word "consent," so as to make it include certain cases where the possession has been obtained by "larceny by a trick," although at one time it was accepted that, if the fraud did amount to larceny by a trick, the possession of the agent was not with the consent of the owner (u). Even now, in so far as the owner is tricked into giving possession to the wrong person, there can be no doubt that the property is not in that person's possession with the owner's consent (v); and equally the same would be the case if he were tricked into parting with the wrong property. But there can also be larceny by a trick where the owner gives possession to the transferee intending the latter to hold the transferred property on a bailment, and the latter, while appearing to take it on those terms, takes it intending to misappropriate it, contrary to the known intention of the owner. In this case there is no contract of bailment, and the possession consequently passes by wrong, and not by contract, the acquisition of the possession by the transferee is accordingly trespassory, and he may therefore be convicted at common law of larceny on his misappropriating the property (w). If, however, his dishonest intention is not formed until after he has received the property, the possession duly passes by contract and the property therefore is in his possession with the consent of the owner and at common law (apart from breaking bulk) the bailee could not be found guilty of larceny as the original taking was not trespassory.

Recently the Courts in England have protested against the view that the question whether a mercantile agent can give a good title to a third person can depend upon the question *quo animo* he received the goods from the owner; for, it is said, the owner intended to give him possession and that is sufficient consent within the meaning of the Act. "I can understand that where by a trick there is error in the person there is no true consent, and the Factors Act is excluded. But where there is agreement on the person, and the true owner intends to give him possession, it does not seem to me that the fact that the person apparently agreeing to accept an agency really means to disregard the agency, and act for his own benefit, destroys the consent of the true owner under the Factors Act. That Act intended to protect a purchaser in good faith carrying out an ordinary mercantile transaction with a person in the position of a mercantile agent. It does not do so completely, for it requires the purchaser to prove that the goods were in possession of the mercantile agent 'with the consent of the owner.' But it does not require the purchaser in addition to prove that the mercantile agent agreed

(u) *Oppenheimer v. Frazer* (1907) 2 K. B. 50, C. A., approving the opinion to that effect expressed in *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899) 1 Q. B. 643, C. A.

(v) *Folkes v. King* (1923) 1 K. B. 282, C. A.
(w) See *Lake v. Simmons* (1927) A. C. 487, where the subject is fully discussed; cf. *Heap v. Motorists' Advisory Agency* (1923) 1 K. B. 577.

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both openly and secretly, ostensibly and really, to the terms on which the owner transferred possession to the mercantile agent. It appears to me to be enough to show that the true owner did intentionally deposit in the hands of the mercantile agent the goods in question. It is admitted that if he was induced to deposit the goods by a fraudulent misrepresentation as to external facts, he has yet consented to give possession and the Factors Act applies, but it is argued that if he deposits the goods in the possession of an agent who secretly intends to break his contract of agency the Factors Act does not apply. I do not think Parliament had any intention of applying the artificial distinctions of the criminal law to a commercial transaction, defeating it if there were larceny by a trick, but not if there were only larceny by a bailee, or possession obtained by false pretences" (x).

The question therefore resolves itself into this; is it permissible, in considering whether the owner consented to the possession of the agent to enquire with what intention the agent took possession? It still awaits decision (y), but there can be little doubt what answer the merchant would give, though a lawyer may find it difficult to say that a thief can give a good title.

Determination of consent.—The English Factors Act provides by section 2 (2) for the case of the mercantile agent continuing in possession after the consent of the owner has been determined and enacts that a sale by him to a third party shall be good if the buyer has no notice of the termination of the consent. This Act, like the earlier English Acts, has no such provision and under the latter it was held that, after the termination of the owner's consent, the agent could not give a good title, however honest the buyer was (z). The omission of the provision therefore may lead to litigation in India.

(3) *The mercantile agent must be acting in the ordinary course of business of a mercantile agent.*

The proviso does not, it will be observed, say "as such mercantile agent," nor do the words used bear that meaning. They were discussed

(x) *Folkes v. King*, *supra*, per Scrutton, L. J., at p. 305. See too per Wright, J., *Buller & Co. v. Brooks, Ltd.*, 142 L. T. 576, at p. 578. "I think the correct view is that the consent of the seller postulated by the section [i.e., s. 25 (2) the equivalent of s. 30 (2) of the Act] is a consent in fact to the buyer having the possession... so that the state of mind of the buyer, who is fraudulently intending to get the possession which he knows the seller would

not give him if he knew the state of the buyer's mind, becomes immaterial in these questions of civil right, however material the criminal state of mind may be in questions of criminal responsibility."

(y) It was deliberately left open by Lord Sumner in *Lake v. Simmons*, *supra*, at pp. 510-511.

(z) *Fuentes v. Montis* (1868) L. R. 3 C. P. 268, 4 C. P. 93. But see Pollock and Mulla, p. 526.

in the case of *Oppenheimer v. Attenborough* (a) in which case the plaintiff entrusted some diamonds to a diamond broker on his representation that some specified firms of diamond merchants would probably buy them; but the broker, having obtained them, pledged them with the defendant, who acted in good faith. It was attempted to show that a diamond broker employed to sell had no authority to pledge, but it was ruled by the trial judge that the words "a mercantile agent" gave the agent a general authority which could not be cut down by any particular trade custom and he accordingly gave judgment for the defendant. This decision was affirmed by the Court of Appeal. Lord Alverstone (at p. 227) expressed the opinion that "acting in the ordinary course of business as a mercantile agent" meant that he "must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorized by his master to carry out": while Buckley, L. J. (at pp. 230, 231), interpreted those words as meaning "acting in such a way as a mercantile agent acting in the ordinary course of business of a mercantile agent would act; that is to say, within business hours, at a proper place of business, and in other respects in the ordinary way in which a mercantile agent would act, so that there is nothing to lead the person (dealing with him) to suppose that anything wrong is being done, or to give him notice that the disposition is one which the mercantile agent has no authority to make"; an opinion in which Kennedy, L. J., appeared to concur. When he is so acting, therefore, he has an ostensible authority given by the Act, which cannot be limited by private instructions or a particular trade custom.

This provision is new, so far as India is concerned. The Indian Contract Act contained nothing equivalent to the limitation as to the "ordinary course of business" (b).

(4) *The buyer must act in good faith and without notice of the want of authority.*

Under section 3, cl. 20 of the General Clauses Act, 1897, a thing is to be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. Gross negligence may be evidence of bad faith, but it is not the same thing and does not entail the same consequences (c). Notice includes both express and constructive notice, and notice to one of two or more co-adventurers, such as partners, is notice to all (d).

(a) (1908) 1 K. B. 221, C. A. and cf. *Weiner v. Harris* (1910) 1 K. B. 285, C. A., overruling *Hastings v. Pearson* (1893) 1 Q. B. 62.

(b) See *G.I.P. Ry. Co. v. Hanmandas* (1889) 14 Bom. 57, 68.

(c) *Jones v. Gordon* (1877) 2 App. Cas. 616, at p. 629.

(d) *Oppenheimer v. Frazer* (1907) 2 K. B. 50, C. A.; *Ramasami Gupta v. Kamalammal* (1921) 45 Mad. 173, 70 I. C. 448, ('22) A. M. 44.

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Burden of proof.—It has been said in England that the buyer relying on the provisions of section 2 (1) of the Factors Act, 1889, must prove his good faith and absence of notice (e), although under section 23 of the Sale of Goods Act, 1893, corresponding to section 29 of this Act, the onus of negating good faith and proving notice is on the person seeking to invalidate the sale (f). The reason assigned for this distinction is that the latter section embodies an exception recognized by the common law to the rule that a seller can give no better title than he himself has got, while the exception to that rule contained in this proviso is purely a statutory exception, and, therefore, the person relying upon it must prove that the facts bring the case within it.

28. If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Sale by one of joint owners.

Sale by a joint owner.—This section in effect reproduces section 108, Exception 2, of the Indian Contract Act. There is no similar provision in the English Act, and in English law, probably, “a co-owner in the absence of estoppel or authority from the other co-owners could only transfer his own share” (g) (unless he sold in market overt). Where one member of a joint Hindu family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption is that he was in possession of it not as separate property acquired by him, but as a member of a joint family (h).

As regards partners, see sections 19 and 20 of the Indian Partnership Act, 1932, which replace section 251 of the Indian Contract Act.

“Permission” used in this section was also used in section 108 of the Indian Contract Act, and it does not appear that the question has yet arisen whether “permission” has the same meaning as “consent” and if not, what the difference is and what the legal effect of the difference may be.

(e) *Heap v. Motorists' Advisory Agency Limited* (1923) 1 K. B. 577. See however the commentary on s. 178 of the Indian Contract Act, Pollock and Mulla, p. 523, where the opposite view is indicated. As a general rule, the equitable doctrines of constructive notice are not extended to purely commercial transactions. *Greer v. Downs Supply Company* (1927) 2

K. B. 28.

(f) *Whitehorn Brothers v. Davison* (1911) 1 K. B. 463, C. A.

(g) Chalmers, p. 73. Partners stand on a different footing, as they are agents for each other. Partnership Act, 1890, ss. 5 & 6.

(h) *Taruck Chunder Poddar v. Jodeshur Chunder Kondoo* (1873) 11 B. L. R. 193.

29. When the seller of goods has obtained possession thereof under a contract voidable under

Sale by person in possession under voidable contract.

section 19 or section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Examples.—The section may be illustrated by the following examples :—

(1) *A* obtained goods by false pretences from the defendant and pawned them to the plaintiff. The defendant subsequently prosecuted *A* to conviction and then obtained possession of the goods. The plaintiff brought trover against him, and it was held that he was entitled to succeed (i).

(2) *A* induced the plaintiff to send him some jewellery on approval by falsely representing that he had a good customer for it. Having obtained the jewellery he pledged it with the defendant. He then induced the plaintiff to invoice the goods to him by representing that the supposed customer required credit. In an action by the plaintiff to recover the goods from the defendant, who had taken them in good faith, it was held that—

(a) *A* having obtained the right to transfer the property in the goods, had obtained them under a contract which, though voidable by the plaintiff, had not been avoided at the time of the pledge to the defendant; and,

(b) In any event, the title of *A* was perfected by the sale to him, at any rate for the time being, and that went to feed the title of the defendant :

and consequently the plaintiff's action failed (j).

(3) *A*, trading under the name of B. & Co., ordered goods from the plaintiffs, and having obtained delivery of them re-sold them to the defendants. There was no such firm as B. & Co., and *A* adopted that name fraudulently for the purpose of representing that he was doing a large business. The plaintiffs, not having been paid for the goods, brought trover against the defendants. It was held that the plaintiffs had made a contract with *A*, and the defendants had obtained a good title to the goods (k).

(i) *Parker v. Patrick* (1793) 5 T. R. 175.

(j) *Whitehorn Bros. v. Davison* (1911) 1 K. B. 463, C. A.

(k) *King's Norton Metal Co. v. Edridge,*

Merrett & Co. (1897) 14 T. L. R. 98, C. A.

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Seller with voidable title.—Under this section as under section 108, Exception 3, of the Indian Contract Act, which it replaces, the seller may give a better title to the buyer than he himself has, though he is not in possession of the goods by the free consent of the owner: for it is clear that as possession is obtained under a contract that is voidable under sections 19 and 19A of the Indian Contract Act, on the ground of coercion (s. 15), undue influence (s. 16), fraud (s. 17), or misrepresentation (s. 18), there can be no free consent (s. 14). The possession, however, must be acquired under a contract and the section therefore does not, any more than the repealed section, cover cases of theft or extortion as defined by sections 378 and 383 of the Indian Penal Code. And though a seller in possession of goods under a voidable contract may transfer the ownership thereof, he cannot do so after the contract is rescinded by the owner. But here the resemblance between this section and the repealed section of the Indian Contract Act ends, for under the latter the ownership of the goods could not be transferred, even before rescission, if the circumstances which rendered the contract voidable amounted to an offence, *e.g.*, wrongful intimidation, cheating or forgery, but no such limitation is contained in the present section (l). It therefore accords more closely than did the repealed section with the common law, which is that “if the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside” (m): and the reason for this is that the effect of fraud “is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance the property passes in the subject matter” (n). A title, therefore, acquired for valuable consideration and in

(l) Even under the Indian Contract Act, if A induced B by cheating to sell and deliver jewels to him and then sold the jewels to C, and B with knowledge of the fact that he was cheated by A sued A and obtained a decree against him, he could not, while the decree was subsisting, rescind the contract and sue C for the recovery of the jewels from him; *Tholasirum v. Duraji* (1905) 15 Mad. L. J. 375. B having affirmed the contract by suing on it was estopped from denying that the property passed. But apparently C's title was by way of estoppel only. Compare *Whitehorn Brothers v. Davison*,

supra, example (2). Much harder questions may arise when a bailee entrusted with goods for a special purpose deals with them in a manner exceeding his authority and not covered by any statutory provision, see *Blundell-Leigh v. Attenborough* (1921) 3 K. B. 235, C. A., reversing the judgment below, *see qu*: see *Law Quarterly Review* XXXVIII 5. But this is not the place to consider such questions.

(m) *Cundy v. Lindsay* (1878) 3 App. Cas. 459, at p. 464.

(n) *Stevenson v. Newnham* (1853) 13 C. B. 285, 302, 93 R. R. 532, Ex. Ch.

good faith by a third party during the time while the contract stands and is not avoided, will not be interfered with (o). S. 29

Goods must be obtained in pursuance of a contract.—That this doctrine may apply, however, it is necessary that the possession of the goods should be obtained in pursuance of and not in a manner which is only in apparent pursuance of a contract. Thus, if there be a contract of sale between *A* and *B*, and *C*, by fraudulently representing to *A* either that he is authorized by *B* to take delivery of the goods on *B*'s behalf, or that he is entitled to delivery as a sub-purchaser from *B*, obtains possession of the goods, he acquires and can give no title whatever, for the goods are delivered to him not in pursuance of, but despite, the contract (*p*). Equally the rule cannot apply when there is no contract at all, though the defrauded owner of the goods is deceived into thinking that he has made one (*q*). In many of the cases which have come before the Courts on this point, the facts are such that there is no difficulty in determining whether there is or there is not a contract in existence, but occasionally the case is very near the line, and it is not quite easy to reconcile all the decisions (*r*).

The difficulty occurs in a particularly acute form in cases in which the whole transaction is carried out between the parties face to face and there is an apparent contract, and possession is obtained under it, but the seller thinks that he is dealing with *A* when in fact he is dealing with *B*. This question was dealt with in a recent case as follows by Lord Haldane (*s*): "Jurists have laid down, as I think rightly the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (*Traité des Obligations*, section 19) lays down the principle thus, in a passage adopted by Fry, J., in *Smith v. Wheatcroft* (*t*). 'Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a

(o) As between himself and the other party to the voidable contract or his trustee in bankruptcy the owner of the goods may apparently avoid the contract at any time before he has done some act to affirm it, though long delay in avoiding may be evidence of affirming; see *Clough v. L. & N. W. Ry.* (1871) L. R. 7 Ex. 26, Ex. Ch.; *Ex parte Ward* (1905) 1 K. B. 465; *Tilley v. Bowman* (1910) 1 K. B. 745.

(p) See section 27, example (8).

(q) See section 27, examples (6) and (7).

(r) Contrast *Whitehorn v. Davison*,

supra, example (2); *Folkes v. King* (1923) 1 K. B. 282, and *Buller & Co., Ltd. v. T. J. Brooks, Ltd.* (1930) 142 L. T. 576, with *Heap v. Motorists' Advisory Agency, Ltd.* (1923) 1 K. B. 577. In the last case the finding that the fraudulent person was guilty of larceny by a trick negatives the existence of a contract: in the former cases the finding that there was no larceny affirms the existence of a contract.

(s) *Lake v. Simmons* (1927) A. C., at p. 501.

(t) (1878) 9 Ch. Div. 223, 230.

5. 29

distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract.....On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand.' In the careful judgment delivered by him in *Phillips v. Brooks* (u), Horridge, J., decided that the alternative view secondly stated by Pothier applied to the case he was dealing with. A fraudulent person had entered a jeweller's shop and looked at and selected certain jewels, which the jeweller was prepared to sell to him individually as a casual customer who had entered the shop. All that remained to be subsequently arranged was payment of the price. The unknown customer, who drew a cheque pretending to be some one else, and signing it in a well-known name, was allowed in exchange for the cheque to take away one of the jewels, of which he disposed subsequently. Horridge, J., found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment. There was therefore consensus with the person identified by sight and hearing, although the title to delivery was voidable as having been induced by misrepresentation (v). In the other type of case referred to by Pothier, where the belief of the contracting seller depends wholly on identity of character or capacity, there is, as Mr. Justice Holmes says at the beginning

(u) (1919) 2 K. B. 243.

(v) It is submitted that this explanation of the case of *Phillips v. Brooks* shows that in the opinion of Lord Haldane the question is in each case a question of fact, which entirely confirms the view expressed in the commentary to s. 13 of the Indian Contract Act, Pollock and Mulla, pp. 82-83. That case, however, had been understood as deciding that as a matter of law an agreement with a person "identified by sight and hearing" is not absolutely void, though personation may render it voidable on the ground of fraud. Whether this is the true view of *Phillips v. Brooks* or not, it is submitted that the case of *Lake v. Simmons* shows that that proposition cannot be regarded as law in England. The fraudulent person, one Eame Ellison, to whom the jewels were handed over in that case was "identified by sight and hearing" but the jeweller was "entirely deceived as to her identity"

and it was "only on the footing and in the belief that she was Mrs. Van der Borgh that he was willing to deal with her at all." There was therefore no contract between them, not even a contract of bailment. The same reasoning, it is conceived, would apply to a contract of sale. As explained, *Phillips v. Brooks* may be regarded as a case of a buyer entering into a contract of sale with the fraudulent intention of not paying for the goods, with the result that the contract was voidable by the seller, as in the case of *Lord v. Green* (1846) 15 M. & W. 216, 71 R. R. 627, so that he had the right to disaffirm it and revert the property in himself, but as before disaffirmance the goods had come into the hands of a pledgee acting in good faith, the latter had a good title. With that proposition, as a proposition of law, there can be no quarrel. In *Dennant v. Skinner* (1948) 2 All. E. R. 29, *Phillips v. Brooks* was applied.

of the ninth lecture in his book on the Common Law, no contract, because there is really only one party."

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Indian and English law not identical.—The corresponding section of the English Act (s. 23) is differently worded and it provides that "when the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." It would appear, therefore, that the present section is of narrower application than the section in the English Act, as it requires that the seller with the defective title should be in possession of the goods, which is not necessary under the English Act and was not necessary at common law (*w*), and this limitation brings it into line with sections 27, 28 and 30. It is conceived, however, that the contract under which possession of the goods is obtained must be one which, if it were not voidable, would pass the property to the fraudulent party or at the very least give him the power either of acquiring the property by approving the article or of transferring it to a third person (*x*) or, to put it in another way, it must be one which gives him a title to sell, though it is voidable and will be avoided when the contract is avoided. Otherwise a person in possession of goods under, say, a contract of hiring which had been induced by his fraud would be able to give a good title to a purchaser from him, when he would not be able to do so if the contract were not voidable. The concluding words of the section bear out this view, for they may be paraphrased as "without notice that his title to sell is defective," and are not apt to describe a case where the seller has no title at all to sell (*y*).

Burden of proof.—Under this section the onus of proving absence of good faith and notice rests upon the persons seeking to invalidate the transaction (*z*). As to the meaning of good faith and notice see the note to section 27, *ante* page 133.

(*w*) See for instance *White v. Garden* (1851) 10 C. B. 919, 84 R. R. 846, in which case the fraudulent seller was never in possession of the goods which he had bought under a voidable contract. The buyer from him, however, was held to have obtained a good title as against the owner, the latter not having avoided the contract until he had delivered the goods to the second buyer.

(*x*) *Whitehorn Brothers v. Davison* (1911) 1 K. B. 463, C. A.; *Buller v. Brooks* (1930) 142 L. T. 576, at pp. 577-578.

(*y*) Section 108, Exception 3, of the Indian Contract Act was very differently worded, and it was said of it (Pollock and Mulla, 5th edition, p. 530), "It will

be observed that the terms of this exception are wider than those of s. 23 of the English Sale of Goods Act, which seems to be limited to cases where property and not merely possession has been acquired under a voidable contract." For the reasons given, however, it is submitted that under this section both possession and property (including in that term the right to transfer the property to a third person) must be obtained, so that the section is narrower than the English section.

(*z*) *Whitehorn Brothers v. Davison*, *supra*. This was the case at common law, which recognized the rule declared by this section. See note to s. 27, p. 134 *ante*.

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30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Seller or buyer in possession after sale.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

Examples.—The section may be illustrated by the following examples :—

(1) A merchant dealing in tobacco and a broker in that trade, has fifty hogsheads lying in bond in his name at a warehouse belonging to the dock company. The dock warrants have been issued to him. He sells the tobacco to the plaintiff, who leaves the dock warrants in his hands and takes no steps to have the tobacco transferred into his own name. The merchant subsequently pledges the tobacco, and hands the dock warrants to the defendant. The defendant, acting in good faith, will acquire a good title against the plaintiff (a).

(2) The plaintiff agreed to buy certain land, subject to his solicitors approving the title, and in consideration of the transaction, to sell his motor car to the vendor of the land, the sale of the car to be carried out simultaneously with the conveyance of the land. Subsequently he gave possession of his motor car on loan to the vendor of the land, who thereupon sold it to the defendant. The plaintiff's solicitors did not approve the title, and consequently the whole transaction fell through. It was held that this was a conditional contract of sale of the motor car, and the defendant, having bought in good faith, obtained a good title to the car (b).

(a) *Johnson v. Crédit Lyonnais* (1877) 3 C. P. D. 32, C. A. as modified by the provisions of sub-section (1).

(b) *Marten v. Whale* (1917) 2 K. B. 480, C. A.

(3) Furniture was delivered to *A* under an agreement whereby *A* was to pay for the hire of the furniture the sum of £97-4-0 by two instalments, the furniture to become the property of *A* on payment of the last instalment. *A* sold it to the defendant before he had paid the last instalment. It was held that there was a binding agreement on *A* to buy the furniture, and the defendant, having bought it in good faith from him, obtained a good title to it (*c*).

(4) In fulfilment of a contract of sale of a certain quantity of copper, the sellers forwarded to the buyer a bill of lading endorsed in blank for the copper, together with a draft bill of exchange for the price of the copper for acceptance. The buyer, who was insolvent, did not accept the bill, but detached the bill of lading from it and handed it to the plaintiffs in fulfilment of a contract which he had already made with them for the sale of the copper. The plaintiffs, acting in good faith, on receiving the bill of lading, paid the price of the copper. It was held that they had obtained a good title to the copper as against the original sellers (*d*).

Dispositions by sellers and buyers.—This section is new. It is similar to section 25 (1) and (2) of the English Act (*e*) and deals with dispositions by sellers and buyers of goods which are violations of the rights of the other party to the contract of sale to or over the goods. Sections 8 and 9 of the English Factors Act, 1889, are in the same terms as sub-sections (1) and (2) respectively of the English section, except that after the words “under any sale, pledge or other disposition thereof,” in each sub-section, the sections of the Factors Act contain the words “or under any agreement for sale, pledge or other disposition thereof.” Those sections re-enacted and extended sections 3 and 4 of the Factors Act, 1877, the operation of which was confined to cases where the seller or buyer respectively had possession of the documents of title, but they did not require, as is required by the present enactments, that the disposition should be effected by the delivery or transfer of the goods or documents of title in order to be protected. Before the Act of 1877 such dispositions were not within the protection of the Factors Acts at all. Consequently if a buyer, for his own convenience, left the goods or documents of title in the hands of the seller and the latter sold or pledged the goods to or with an innocent purchaser or pledgee, the buyer could recover them (*f*); and as regards the buyer in possession “it had been

(*c*) *Lee v. Butler* (1893) 2 Q. B. 318, C. A. cf. *Gopal v. Sorabji* (1904) 6 Bom. L. R. 871.

(*d*) *Cahn v. Pockett's Bristol Channel Steam Packet Co., Ltd.* (1899) 1 Q. B. 643, C. A.

(*e*) It is indeed identical with it, except that sub-section (2) of the English

Act concludes with the words “as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner,” instead of “as if such lien or other right did not exist.”

(*f*) *Johnson v. Crédit Lyonnais, supra*, example (1).

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repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee did not defeat the unpaid vendor's rights, because the vendee was not entrusted as an agent" (g). The law in these respects is now altered.

Seller in possession.—It is clear that the protection of the sub-section is only required where the property in the goods has passed to the buyer and the buyer is not in default, for when the property has not passed, the buyer has in any view only a *jus in personam* against the seller and no *jus in rem* (h), and when he is in default, the case is covered by section 54 of the Act. It is also clear that the goods or documents need not remain or be in possession of the seller with the consent of the buyer, so the seller's possession may be entirely tortious as against him. It is equally clear that sub-section (1) does not apply unless there has been delivery of the goods to the subsequent buyer or a transfer of a document of title to him. Thus in one of the first decisions (i) under the sub-section, wine stored in a warehouse was sold, and after the sale pledged to the warehouseman by the seller executing a memorandum of charge and without notice to the warehouseman of the sale. It was held in that case that the sub-section did not apply, for there had been no delivery of the goods to the warehouseman nor any transfer of a document of title to him; and one or other of these things is necessary under the sub-section (j).

Some difficulty was occasioned by the words "is in possession of the goods." It was thought that read literally the sub-section would apply to a case where the buyer bought, paid for and took away a watch from a jeweller and brought it back to him the following day or week to repair some slight damage to it in the meantime. But it has now been decided that the sub-section does not apply to cases where the sale having been completed the goods are bailed or leased back to the seller (k). The sub-section is to be confined to cases where the contract of sale has not been completed by delivery (l).

It has further been held that the word "possession" includes possession by another person on behalf of the person whose possession is material (m).

Examples.

(1) *H*, a dealer in motor vehicles, sold a motor lorry to the defendants, and the defendants entered into a hire purchase agreement with *H* and let

(g) *Cole v. North Western Bank* (1875) L. R. 10 C. P. 354, at 373, per Blackburn, J.

(h) See note to s. 22.

(i) *Nicholson v. Harper* (1895) 2 Ch. 415.

(j) Cf. *Kitto v. Bilbie Hobson & Co.* (1895) 72 L. T. 266.

(k) *Staffs Motor Guarantee, Ltd. v.*

British Wagon Company (1934) 2 K. B. 305, approving *Mitchell v. Jones* (1905) 24 N. Z. L. R. 932.

(l) *Union Transport Finance, Ltd. v. Ballardie* (1937) 1 K. B. 510.

(m) *City Fur Manufacturing Co., Ltd. v. Furenbond (Brokers) London, Ltd.* (1937) 1 A. E. R. 799.

the lorry to him on those terms. *H* then being in possession of the lorry fraudulently sold it to the plaintiffs who were not aware of the previous transaction between *H* and the defendants. Held that *H* after the transaction between him and the defendants had been completed by the agreement for hire purchase was not in possession of the lorry as a person who "having sold goods continues or is in possession of the goods" but as a bailee and therefore the delivery or transfer by him of the lorry under the sale to the plaintiffs had not the same effect as if it had been authorised by the defendants and was not thereby rendered valid against the defendants (*n*).

(2) *L* held certain furs in his warehouse which was the property of *H* subject to payment of £178 as warehouse charges. *H* sold the furs to the plaintiffs who paid *H* the price subject to the understanding that *H* would pay off the monies due to *L*. Instead of doing that, *H* pledged the furs to the defendants for £178. *L* was paid off by the defendants and received an order from *H* to deliver the furs to the defendants, which was done. Held that *H* was vendor in possession through the warehouseman *L* and that the pledge to the defendants was valid (*o*).

(3) The plaintiffs purchased goods from *G*, who then, as the agents of the purchaser, let the goods on hire purchase to *F*. *F* defaulted, and *G* retook possession of the goods and then sold them to the defendants. Held that the defendants were not protected by section 30, sub-section (1) as *G* was in possession of the goods at the date of the second sale not as the original seller to the plaintiffs but under an implied mandate from them to recover the goods from a defaulting hirer and hold them as bailee (*p*).

Buyer in possession.—Under sub-section (2) if the possession of the property is obtained by the buyer with the consent of the seller, it is immaterial that the consent was subsequently withdrawn (*q*). It would also seem that the consent need not necessarily be free consent, for cases of that kind, so far at any rate as documents of title are concerned, appear to be dealt with by section 53, so that, provided at any rate that the possession is not obtained by that species of fraud which constitutes larceny by a trick, the sub-section would appear to apply even if the possession be obtained by fraud. As regards larceny by a trick, the English authorities are in the same state of uncertainty under this sub-section as they are under the proviso to section 27 (*r*).

(*n*) *Staffs Motor Guarantee, Ltd. v. British Wagon Company* (1934) 2 K. B. 305.

(*o*) *City Fur Manufacturing Co., Ltd. v. Furenbond (Brokers) London, Ltd.* (1937) 1 A. E. R. 799.

(*p*) *Olds Discount Company, Ltd. v.*

Krett (1940) 2 K. B. 117.

(*q*) *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, *supra*, example (4). This statement is subject to the sub-buyer having no notice of the withdrawal of the consent.

(*r*) See the notes to that section.

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The sub-section, however, does not apply if the buyer obtains the documents in his own right. Thus, if the seller under a f.o.b. contract, on shipping the goods, takes the mate's receipt in his own name, thereby reserving the power to obtain a bill of lading to his own order, and the buyer afterwards demands and obtains the bill of lading from the master, he does not obtain it with the consent of the seller (s).

Subject to this, it would appear that the three main cases to which the sub-section would apply are as follows :—

First, where the buyer obtains possession of the goods before the property has passed to him. Occasionally perhaps the sub-section may have to be invoked in cases where the property has passed to the buyer, as when the seller by the contract reserves some special interest in the goods (t), or where they are intended to be subject to the seller's lien, and he delivers them to the buyer for some purely temporary purpose on the undertaking of the buyer to re-deliver them to the seller to keep in his possession until the price is paid (u). Apart, however, from these somewhat rare cases, the sub-section is scarcely applicable to cases in which the buyer is in possession after the property has passed to him. Such cases usually fall to be dealt with under the preceding section. The sub-section will apply, however, if the contract is no more than a conditional contract of sale (v) ; but there must be a contract of sale in order that the sub-section may apply. It will not, therefore, as has already been seen, apply to a case where the goods are in the possession of the optional buyer under section 24 or under a hire-purchase agreement (w), for an option to purchase is not sufficient. It must be remembered, however, that many so-called hire-purchase agreements are really agreements to buy, though the property does not pass until the last instalment is paid. In such cases the sub-section will apply (x).

The second case is where the buyer has obtained possession of the documents of title before the property in the goods has passed to him.

The leading authority on this class of case is *Cahn v. Pockett's Bristol Steam Packet Co.* (y). It will be observed that by reason of the provisions of section 25 (3), the property in the copper never passed to the buyer, but the buyer had obtained possession of the bill of lading with the consent of the sellers, for, although it was the buyer's duty to return the bill of lading as he did not accept the bill of exchange annexed to it, he in no way

(s) See *Craven v. Ryder* (1815) 6 Taunt. 433, 16 R. R. 644, and cf. *Inglis v. Robertson* (1898) A. C. 616.

(t) See for example *Dodsley v. Varley* (1840) 12 A. & E. 632, 54 R. R. 652.

(u) See for example *Tempest v. Fitz-*

gerald (1820) 3 B. & Ald. 680, 22 R. R. 526.

(v) *Marten v. Whale*, *supra*, example (2).

(w) See section 27, and the examples.

(x) *Lee v. Butler*, *supra*, example (3) and notes to s. 4, p. 33, *ante*.

(y) *Supra*, example (4).

tricked the sellers into parting with the bill of lading, for they sent it to him quite voluntarily. The plaintiffs therefore obtained a good title to the copper as against the original sellers, for, "from the point of view of the *bona fide* purchaser, the ostensible authority based on the fact of possession is the same, whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not" (z).

S. 30

The third case is where the buyer obtains the documents of title after the property in the goods has passed to him, but the goods are still subject to the seller's lien or right of stoppage in transit, or subject perhaps to some special interest reserved by the contract. Cases of this class overlap with those dealt with by section 53, and will be considered under that section. This does not, however, mean that this sub-section is superfluous in this respect, for it provides for cases where the documents are improperly obtained, and protects the second purchaser who takes them in good faith and without notice of the original seller's rights: while section 53 assumes that the documents are properly obtained. Apart from this the effect of the two sections as applied to this class of case would appear to be the same.

Burden of proof.—As regards the burden of proving or disproving good faith and notice, if the distinction taken in England between the sections which are declaratory of the common law and those which are statutory exceptions to it is to prevail, the onus will be on the person seeking to affirm the transaction (a).

(z) Per Collins, L. J. (1899) 1 Q. B. at p. 658.

(a) See notes to sections 27 and 29, and as regards good faith and notice, the notes to the former section.

CHAPTER IV.

PERFORMANCE OF THE CONTRACT.

**Se.
i, 32**

31. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

Delivery and acceptance.—The general rule enunciated in this section follows from the nature of the contract of sale, by which the property in the goods is transferred, or agreed to be transferred, from the seller to the buyer in return for the price. “The property” involves the right to have possession of the goods, and it is therefore the duty of the seller to complete the contract by giving the buyer possession, whether the goods be in the hands of himself or of a third party; and the buyer’s obligation is correlative to accept the goods and pay the price.

This section must be read subject to the provisions of Chapter V, *post* and sections 7 and 8, *ante*. Moreover, the parties may make such stipulations as they please, both as to matters which may excuse delivery by the seller or payment of the price by the buyer, or make either dependent upon such conditions as they may choose to agree upon.

32. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

Delivery and payment.—This section reproduces section 28 of the English Act, and embodies a rule which has long been established. “Where two acts are to be done at the same time, as where *A* covenants to convey an estate to *B* on such a day, and in consideration thereof *B* covenants to pay a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act: and this particularly applies to all cases of sale” (*b*).

(*b*) Notes to *Pordage v. Cole*, 1 Wms. Saunders (ed. 1871), p. 556. In the old system of pleading, the plaintiff was bound to allege in the declaration his performance or readiness to perform

all conditions which he was bound to fulfil. See Pollock and Mulla, p. 296. Many of the older cases, therefore, are decided upon the sufficiency of the declaration or the materiality of the plea.

A contract of sale, therefore, is an example of a contract consisting of reciprocal promises to be simultaneously performed. In accordance, therefore, with the general principle laid down in section 51 of the Indian Contract Act, the seller is not bound to deliver, and commits no breach of contract in failing to deliver, if the buyer is not ready and willing to pay the price on delivery (c); and conversely, the buyer is not bound to pay the price, and is not liable to an action for failure to accept the goods, if the seller was not ready and willing to let the buyer have the goods on demand (d).

Readiness and willingness (e).—"Readiness and willingness" includes capacity (f). If the buyer is insolvent, or states that he will not accept delivery, this is strong evidence that he is not ready and willing to pay (g). On the other hand, the seller need not have the goods in his actual custody or possession. It is sufficient if he has such control of them that he can cause them to be delivered (h); and similarly, the buyer is ready and willing to pay if he has made proper arrangements for securing payment (i). It follows from this that actual tender of delivery (j), or of the money (k), is unnecessary to enable the seller to maintain an action for the price or failure to accept, or the buyer to maintain an action for failure to deliver. In England, moreover, the mere demand by the plaintiff on the defendant to perform his contract is in itself sufficient evidence of the plaintiff's readiness and willingness to perform his part of the contract, and he need not prove anything more (l), unless evidence is forthcoming that the defendant was ready and willing to perform his part of the contract on the plaintiff performing his. When such evidence is forthcoming, it is for the

(c) *Morton v. Lamb* (1797) 7 T. R. 125, 4 R. R. 395.

(d) *Dixon v. Fletcher* (1837) 3 M. & W. 146, 49 R. R. 543.

(e) See Pollock and Mulla, pp. 294-296.

(f) *De Medina v. Norman* (1842) 9 M. & W. 820, 60 R. R. 912.

(g) *Lawrence v. Knowles* (1839) 5 Bing. N. C. 399, 50 R. R. 721; *Chunna Mal-Ram Nath v. Mool Chand-Ram* (1928) 55 I. A. 154, 9 Lah. 510, 108 I. C. 678, (28) A. P. C. 99. (See Pollock and Mulla, p. 337.)

(h) *Kamwar Bhan-Sukha Nand v. Ganpat Rai-Ram Jiwan* (1926) 7 Lah. 442, 94 I. C. 304, (26) A. L. 318, and *Nalam Lacksnikantham v. Narayana-swami Iyer* (1926) Mad. W. N. 710, 97 I. C. 986, (26) A. M. 1109. As regards the sale of shares, see *Imperial Banking & Trading Co. v. Atmaram Madhavji* (1865) 2 B. H. C. 246; *Parbhudas Pranji-vandas v. Ramlal Bhagirath* (1866) 3 B. H. C. 69; *Jivraj Megji v. Poulton*

(1865) 2 B. H. C. 253, Pollock and Mulla, 294-296.

(i) *Kidar Nath-Behari Lal v. Shimbru Nath-Mandu Mal* (1926) 8 Lah. 198, 99 I. C. 812, (27) A. L. 176.

(j) *Jackson v. Allaway* (1844) 6 Man. & G. 942; *Boyd v. Lett* (1845) 1 C. B. 222; *Levey v. Goldberg* (1922) 1 K. B. 688, 692 and cases cited in note (h).

(k) *Rawson v. Johnson* (1801) 1 East. 203, 6 R. R. 252; *Waterhouse v. Skinner* (1801) 2 B. & P. 447; *Shriram Rupram v. Madangopal Gowardhan* (1903) 30 Cal. 865; *Peare Lal-kishan Prasad v. Diwan Singh-Ganeshi Lal* (1930) 28 All. L. J. 777, 125 I. C. 453, (30) A. A. 661; of. *Pickford v. Grand Junction Ry.* (1841) 8 M. & W. 372, 378, 58 R. R. 742.

(l) *Wilks v. Atkinson* (1815) Marshall 412 (the report of this case in 6 Taunt. 11 makes no reference to this point); *Squier v. Hunt* (1816) 3 Price 68; *Levy v. Lord Herbert* (1817) 7 Taunt. 314, 318. Notes to *Peeters v. Opie*, 2 Wms. Saunders (1871) 744, 747. Chalmers, p. 84.

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jury to decide which party was really in fault (*m*). The Indian Courts, however, in dealing with cases under section 51 of the Indian Contract Act, do not appear to have adopted the English rule, and it seems that in India the plaintiff must go further and give some affirmative evidence that he was ready and willing to perform his part of the contract (*n*), and in all cases where the plaintiff has succeeded, such evidence has been forthcoming. As this Act is part of the Indian Contract Act, it is conceived that the rule hitherto acted upon by the Indian Courts must still prevail. In accordance, however, with the general rule in these matters, a wrongful refusal by one party to be bound by the contract discharges the other from the performance of conditions which he would otherwise have to fulfil, and the latter is thereupon exonerated from the necessity of proving his readiness and willingness to perform them (*o*).

Agreement to the contrary.—The rule only applies where there is no agreement to the contrary. Subject to the law as enacted in Chapter V, therefore, a sale on credit renders the rule inapplicable, and the buyer is entitled to delivery without offering the price in exchange. Conversely, the buyer may bind himself to pay the price or part of it on a fixed day, whether delivery has been made or not (*p*). Again, under the usual form of a c.i.f. contract, the price is payable in exchange for the shipping documents (*q*), though this exception perhaps is more apparent than real, for the contract may be regarded as a sale of goods of which delivery is effected by the transfer of the documents (*r*).

33. Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of a horse. The seller at the buyer's request agrees to keep it at livery, and removes the horse from one part of his stable to another. This is delivery of the horse (*s*).

(*m*) *Lawrence v. Knowles*, *supra*, and see *Paynter v. James* (1867) L. R. 2 C. P. 348, 357.

(*n*) See Pollock and Mulla, p. 295, *Ganesh Dal-Ishar Das v. Ram Nath* (1928) 9 Lah. 148, 111 I. C. 498, (28) A. L. 20; *Chengravelu Chetty & Sons v. Akarapu Venkanna & Sons* (1924) 49 Mad. L. J. 300, 86 I. C. 299, (25) A. M. 971.

(*o*) See notes to sections 38 and 60, and see *Dayabhai Dipchand v. Maniklal Vrijbhukan* (1871) 8 B. H. C. A. C. 123.

(*p*) See s. 55 (2).

(*q*) *E. Clemens Horst & Co. v. Biddell Brothers* (1912) A. C. 18.

(*r*) See note to s. 39 on c.i.f. contract.

(*s*) *Elmore v. Stone* (1809) 1 Taunt. 458, 10 R. R. 578.

(2) Sale of a horse. The seller then asks the buyer to lend him the horse for a short time. The buyer assents and leaves the horse in the custody of the seller. This is delivery of the horse to the buyer (*t*).

(3) Sale of certain specific goods which are locked up in a godown. The seller gives the key of the godown to the buyer in order that he may get the goods. This is a delivery (*u*).

(4) Sale of goods to be delivered by the seller at the buyer's premises. The goods are delivered by the seller's agent to a person at those premises reasonably appearing to be authorized to receive the goods, but not authorized in fact. This is a good delivery (*v*).

(5) *A* sells to *B* 50 maunds of rice in the possession of *C*, a warehouseman. *A* gives *B* an order to *C* to transfer the rice to *B*. *C* assents to this order and transfers the rice in his books to *B*. This is a delivery (*w*).

(6) *A* sells to *B* 5 specific casks of oil. The oil is in the warehouse of *A*. *B* sells the 5 casks to *C*. *A* receives warehouse rent for them from *C*. This amounts to delivery of the oil to *C*, as it shows the assent of *A* to hold the goods as warehouseman of *C* (*x*).

Delivery.—This section reproduces section 90 of the Indian Contract Act, with the addition of the words “which the parties agree shall be treated as delivery.” These words may cover cases which were left open by the original section (*y*).

Acceptance and receipt.—In English law a contract for the sale of goods of the value of £10 or upwards, is by statute not enforceable unless “the buyer shall accept part of the goods so sold and actually received the same” or satisfy one or other alternative conditions not now material (*z*). Hence there have been many decided cases as to what amounts to acceptance and receipt for this purpose. There have also been many decisions on the question of what amounts, apart from the statute, to a delivery

(*t*) *Marvin v. Wallis* (1856) 6 E. & B. 726, 106 R. R. 784.

(*u*) This is taken from illustration (c) to section 90 of the Indian Contract Act. For a closely analogous case see *Wrightson v. McArthur and Hutchisons* (1919), *Ltd.* (1921) 2 K. B. 807.

(*v*) *Galbraith and Grant, Ltd. v. Block* (1922) 2 K. B. 155.

(*w*) This is taken from illustration (e) to section 90 of the Indian Contract Act. It is the normal case assumed as such in all the decisions on more complex facts.

(*x*) This is taken from illustration (d) to section 90 of the Indian Contract Act. It is based upon the case of *Hurry v. Mangles* (1808) 1 Camp. 452, 10 R. R.

727. At that date the distinction between the vendor's lien on goods remaining in his possession and the right to stop in transit was not yet fully understood, and the head-note and judgment both say, erroneously according to modern usage, that the right to stop in transit had come to an end. The case is further discussed in the notes to this section.

(*y*) They will probably cover such a case as arose in *Galbraith & Grant v. Block*, *supra*, example (4).

(*z*) Sale of Goods Act, 1893, section 4, reproducing in substance the 17th section of the Statute of Frauds. On the definition of acceptance see sub-section (3).

transferring possession from the seller to the buyer, a question which may arise in various ways either between the parties or by reason of adverse claims of third persons. The "actual receipt" of the Statute of Frauds, appears on the whole to correspond to the delivery of the present section, regarded however, from the buyer's point of view. Acceptance is something more, namely, recognition of certain goods as part of the goods sold under the contract in question, "such a dealing with the goods as amounts to a recognition of the contract." Whether the buyer's conduct, satisfies this description is a question of fact. It may or may not also be an appropriation to the contract of goods previously unascertained, and it need not amount to an admission that the goods are according to contract (a). Acceptance and receipt taken together, seem to mean that the buyer has assumed possession of some part of the goods with reference to the contract of sale, and as being appropriated thereto.

Although the Statute of Frauds is happily not in force in India, principles of general application are often involved in English cases decided upon the Statute, and therefore some acquaintance with its provisions (now re-enacted and in part made clearer by the English Sale of Goods Act) is still indispensable to Indian practitioners, at any rate in the High Courts, in order to understand which parts of the English judgments turn only on the language of the Statute and which have an independent value.

"Symbolic" delivery.—The delivery of the key to the purchaser [see example (3)] transfers possession because, and only because, it gives him actual control of the place where the goods are, and thereby of the goods themselves. This is believed to be the correct view in English law, notwithstanding the language that has sometimes been used about symbolic delivery. As Lord Hardwicke said long ago, "delivery of the key of bulky goods.....has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do" (b). But delivery of a key may properly be called a symbol in so far as it is an emphatic declaration of intention to transfer control; in this manner it may be material even in the case of immoveables, where it could have no effect standing alone.

A goes to live in B's house with B's consent. C, acting under A's orders, takes furniture of A's to B's house, puts it in certain rooms, locks the doors of those rooms, and takes away the key, to the knowledge of B's servants and without any objection. This is relevant to show that A has not delivered the goods to B to hold as bailee, but, on the contrary, B has

(a) *Page v. Morgan* (1885) 15 Q. B. D. 228, C. A., per Bowen, L. J., at p. 233; *Taylor v. Smith* (1893) 2 Q. B. 65, C. A.; *Abbott v. Wolsley* (1895) 2 Q. B. 97, C. A. (b) *Ward v. Turner*, 2 Ves. Sr. 431, 1 Dick. 170.

given possession to *A* of the rooms in which the goods are placed (*c*). In the case of goods, the effect of delivering a key, so far as it is effective, is to give actual control of the goods. Delivery of the key of a wharf where timber is lying has been judicially said to carry "manual control" of the timber (*d*). Nor is this surprising; for actual possession of partially cleared lands, bulky goods, and so forth, has always been held to be acquired by such control and occupation as the nature of the subject-matter admits (*e*). This has been admitted to be the governing principle even when the terms "symbol" and "constructive possession" have been, perhaps not quite aptly, used at the same time (*f*). It is conceived that merely telling a man that the key of a warehouse, etc., is at his disposal is at most a licence, and, as regards property or possession, has no effect at all until he acts on the authority (*g*).

Delivery of a key does not operate as delivery of the goods under the lock if it does not in fact give complete access to them. Where a seller gave the buyer the key of a receptacle in which the goods were, but retained the key of an outer inclosure, it was held without difficulty that the buyer had not acquired possession (*h*). In such a case the seller's possession continues, not because he has in fact complete and exclusive control (for he has it not), but because the common law does not recognize any partial transfer of possession, and does not allow possession to be vacant, and legal possession once acquired continues until it is completely changed, or the subject-matter ceases to exist.

Constructive delivery.—Apart from this rather outlying question, it is to be observed, and it is shown by the examples given above, that a change in the possession of goods, and therefore delivery within the definition, may take place without any change in their actual and visible custody. There is said to be constructive delivery in such cases, and they may be classified as follows (*i*):—

(1) A seller in possession of the thing sold assents to hold it solely on the buyer's account. There may be constructive delivery of this kind

(*c*) *Ancona v. Rogers* (1876) 1 Ex. Div. 285, C. A.

(*d*) *Gough v. Everard* (1863) 2 H. & C. 1, 133 R. R. 558.

(*e*) See *Lord Advocate v. Young* (1887) 12 App. Cas., at pp. 553, 556; *Wrightson v. McArthur & Hutchisons* (1919), Ltd. (1921) 2 K. B. 807.

(*f*) *Hilton v. Tucker* (1888) 39 Ch. D. 669, 676. If *C* holding for *A* the key of a room containing *A*'s goods is told by *A*, with *B*'s consent, to hold it at *B*'s disposal, this may well enough be called a constructive delivery to *B*; but it is not clear from the report exactly what

the facts were, or were thought by the Court to be.

(*g*) If *Hilton v. Tucker* (last note) meant to decide the contrary, it would, it is conceived, not be law; but there is no necessity to read it so.

(*h*) *Milgate v. Keble* (1841) 3 Man. & Gr. 100, 60 R. R. 475. This case is cited in text-books as an authority on unpaid vendor's lien, but really adds nothing to the law on that head. The only question was whether there had been a delivery, and it was so treated by the Court.

(*i*) Cf. Chalmers, pp. 146-147. Pollock and Wright on Possession, pp. 40, 71-75.

where he continues to hold as a bailee for a reward or as a gratuitous borrower [see examples (1) and (2)]. The seller's assent must be proved ; it will not be presumed (j). But acts of the buyer treating himself as owner and the seller as his servant or bailee are relevant to prove delivery as against the buyer. Thus where *A* ordered a certain quantity of goods (not yet specified) of *B* and *B* sent *A* an invoice specifying particular goods as sold to *A* "free for six months," i.e., to remain in *B*'s warehouse without charge, credit also being given for six months, and at the end of the six months *A* asked *B* if he would take the goods back or sell them on *A*'s account, this was held evidence of assent by *A* to *B* holding those goods for him as warehouseman (k). The fact, however, that the buyer pays, or agrees to pay, warehouse rent for goods left in the seller's warehouse is not of itself sufficient to show that the seller holds as his bailee. Lord Ellenborough, it is true, in the case of *Hurry v. Mangles* (l) used language to the effect that acceptance of warehouse rent is of itself "a complete transfer of the goods." "If I pay for a part of a warehouse, so much of it is mine." These observations would be applicable if the buyer had actually rented part of the warehouse, and the goods bought by him were transferred to that part. If there is nothing but payment of warehouse rent, or agreement to pay it, the proposition is too wide, and is disallowed by later authorities (m). Lord Ellenborough's language, in fact, does not accord with commercial usage. Warehouse rent is not rent in the ordinary economic sense, and the owner making payment so-called is not entitled to have his goods stored in any particular part of the warehouse. He is no more a tenant than the railway passenger who leaves goods in a cloak-room.

(2) The most frequent and important case is where a seller and buyer agree, with the assent of a third person, in whose custody the goods are, and who has been holding them for the seller, that he shall hold them on account of the buyer. Such an "agreement of attornment," as it is sometimes called, has the effect of transferring legal possession to the buyer. All three parties must concur, otherwise there is no delivery. Accordingly, where the seller directed the warehouseman to transfer the goods sold to the buyer's order, and the warehouseman did so and sent the invoice and certificate of transfer by his clerk to the buyer with a request

(j) *Re Roberts* (1887) 36 Ch. D. 196, 200.

(k) *Castle v. Swoorder* (1861) 6 H. & N. 828, 123 R. R. 860, Ex. Ch., distinguished in *Dublin City Distillery v. Doherty* (1914) A. C. 823, where Lord Atkinson reviews the authorities on constructive delivery. The facts were rather peculiar.

(l) *Supra*, example (6).

(m) *Miles v. Gorton* (1834) 2 Cr. & M. 504, 39 R. R. 820, approved in *Grice v.*

Richardson (1877) 3 App. Cas. 319, P. C.

"I do not think that the payment of warehouse rent to the vendor has the effect of a constructive delivery of the whole in a case where the goods remain in the possession of the vendor"; per Bayley, B. 2 Cr. & M. 510, 39 R. R. 826. It is not quite clear what, in the later case, the Judicial Committee meant by saying that "there was no actual delivery." See Blackburn on Sale, p. 341.

for payment, but the buyer refused payment, it was held that there was no attornment, and therefore no delivery, as the buyer had not assented to the warehouseman holding the goods as his agent (*n*). Nor is the mere handing of a delivery order or the like by the seller to the buyer sufficient (*o*); the seller's bailee must be instructed and must assent to hold for the buyer. When once, however, the assent of all three is obtained, the delivery as between seller and buyer is completed, and the seller will not be responsible if the bailee afterwards wrongfully delivers the goods to some third person (*p*).

The case of *Hurry v. Mangles* (*q*) is really one of agreement by attornment. Although the payment of rent by the buyer is not, as already stated, sufficient to show that the seller holds as his bailee, the case is not the same where the first buyer sells to a sub-buyer, and the original seller by his direction assents to hold the goods for the sub-buyer. The fact that the seller receives rent from the sub-buyer is evidence of that assent, and can scarcely be explained on any other hypothesis, and all that it is necessary to prove further is the assent of the buyer to the arrangement. That assent is assumed in the example: and the only correct reason as applicable to the case where there is a sale over to a new buyer is given in the example.

(3) If the buyer is already holding the goods as the seller's bailee, and the seller agrees with him that he shall hold them as owner, the character of the possession is changed accordingly, and the buyer ceases to hold as bailee, and begins to hold as owner, as where an agent entrusted with goods for sale agrees to buy them himself (*r*). Acts relied on to prove such an agreement must, of course, be unambiguous. This case is not very common.

The significance of this group of sections on delivery can be fully understood only in connexion with the subsequent sections on seller's lien and stoppage in transit.

It is not every case in which delivery is spoken of that illustrates the present section. Thus, an auctioneer who sold a rick of hay standing, and showed an acknowledgment from the owner of his right to sell, was held not liable to an action at the suit of the buyer for not delivering the hay,

(*n*) *Godts v. Rose* (1855) 17 C. B. 229, 104 R. R. 668. For a case where there was no assent by the seller, see *Poulton & Son v. Anglo-American Oil Co., Ltd.* (1911) 27 T. L. R. 216, C. A. As to the necessity for the bailee's assent, see section 36 (3).

(*o*) *McEwan v. Smith* (1849) 2 H. L. C. 309, 81 R. R. 166; *Farina v. Home* (1846) 16 M. & W. 119 73 R. R. 433. In the

language of the English cases on the Statute of Frauds, taking and keeping a delivery order is evidence of acceptance, but not of receipt.

(*p*) *Wood v. Tassell* (1884) 6 Q. B. 234, 66 R. R. 374.

(*q*) *Supra*, example (6).

(*r*) *Edan v. Dudfield* (1841) 1 Q. B. 302, 55 R. R. 258; *Blundell-Leigh v. Attenborough* (1921) 3 K. B. 235, C. A.

when the owner afterwards wrongfully revoked his authority and refused to give the buyer, on the auctioneer's order, access to the hayrick (*s*). The purchaser bought with knowledge of all the facts, and the auctioneer, who never had any possession at all, either of the hay or of the place where it stood, could do no more for the purchaser than he did. But it is clear that the buyer did not acquire possession, though he did acquire property and an immediate right to possess the goods; there was, therefore, no question of delivery within the meaning of the present section.

34. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, ^{Effect of part delivery.} for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of a quantity of goods lying at a wharf. The seller left an order with the wharfinger to deliver the goods to the buyer, who had paid for them by a bill. The buyer subsequently weighed the goods and took away part of them. This was held to amount to a delivery of the whole of the goods (*t*).

(2) A ship arrived in port with a cargo of wheat. The master reported her at the Customs House and made oath that the cargo was for *A*, the endorsee of the bill of lading. Next day *A* made entry of the wheat in his name at the Customs House. Part of the cargo was then delivered to *A*. This constituted a delivery of the whole (*u*).

(3) The buyer of a cargo of wheat made an assignment of his effects to trustees for the benefit of his creditors, and endorsed the bill of lading to one of the trustees with an endorsement directing the master "to deliver possession of the within-mentioned quantity of wheat to R. J., being one of my assignees, to be disposed of as he may think proper." The ship arrived at an intermediate port and the trustees took samples of the wheat and sold the greater portion to sub-buyers, to whom it was delivered,

(*s*) *Salter v. Woollams* (1841) 2 Man. & Gr. 650, 58 R. R. 513. The opinion expressed in Benjamin on Sale (4th ed., 683) that the former owner actually became a bailee by attorning in advance to an unknown purchaser is questionable. This does not affect the practical result of the case. On Mr. Benjamin's view the buyer was a bailee at will, and might

have had an action of trespass *vi et armis* against a stranger. This is doubtful but no such question arose. See now the editor's addition in 7th ed., p. 727.

(*t*) *Hammond v. Anderson* (1803) 1 B. & P. N. R. 69, 8 R. R. 763.

(*u*) *Stubey v. Heyward* (1795) 2 H. Bl. 504, 3 R. R. 486.

and directed the master to take the remainder to the final port of destination, which he did. In these circumstances it was held that the whole cargo had been delivered at the intermediate port (*v*).

(4) Sale of a stack of hay. The buyer asked the permission of the seller to cut and remove part of the stack, which was granted. The clear intention of the parties being to separate the part delivered from the residue, the delivery of part was not the delivery of the whole (*w*).

(5) *A* sells 5 bales of goods to *B* to be paid for on delivery. *B* receives and pays for one bale, and refuses to take the others as not being according to description. There has not been a delivery of the whole and *A* may be entitled to sue *B* for not accepting the four bales, but cannot sue for their price (*x*).

Part delivery.—This section must be compared with sections 48 and 51 (7), which relate to the effect of delivery of part of the goods on transferring the possession in the remainder to the buyer, so as to put an end to the seller's lien or right of stoppage in transit. It is usually in the latter connexion that the question arises, and the examples are for the most part cases of that kind ; but the question in each case is the same, namely, whether delivery of part constitutes delivery of the whole, and answer depends upon the application of the same principle.

The common law rule, which this section affirms, is that delivery of part may be delivery of the whole if it is so intended and agreed, but not otherwise, and the burden of proof seems to be on the party affirming that such was the intention (*y*). "It seems to me," said Brett, L. J., "that a delivery of part or even of the bulk of a cargo, is not *prima facie* a delivery of the whole, and that those who rely upon the part delivery as a constructive delivery of the whole are bound to show that the part delivery took place under such circumstances as to make it a constructive delivery of the whole" (*z*). "It is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole" (*a*), i.e., a recognition that the actual holder of the residue has begun to hold as the buyer's agent. "If part be delivered with intent to separate that part from the rest, it is not an inchoate delivery

(*v*) *Jones v. Jones* (1841) 8 M. & W. 431, 58 R. R. 765.

(*w*) *Bunney v. Poyntz* (1833) 4 B. & Ad. 568, 38 R. R. 309.

(*x*) *Mitchell Reid & Co. v. Buldeo Doss* (1887) 15 Cal. 1.

(*y*) Lord Blackburn in *Kemp v. Falk* (1882) 7 App. Cas. 573, 586.

(*z*) *Ex parte Cooper* (1879) 11 Ch. Div.

68, 73, C. A. If the cargo were one machine, or the like, in parts and an essential part were delivered first, that might be such a circumstance. *Ib.*, at p. 75.

(*a*) *Willes, J., Bolton v. L. & Y. R. Co.* (1866) L. R. 1 C. P. 431, at p. 440 ; *Pranlal Bhaichand v. Maneckji Petit Manufacturing Co.* (1932) 34 Bom. L. R. 1252, 140 I. C. 610, ('33) A. B. 46.

of the whole" (b). Still less can it be so if there is refusal to deliver or accept the whole (c). What was the intention in any particular transaction is a question of fact to be determined with regard to all the circumstances, and on this precedent can be only suggestive.

35. Apart from any express contract, the seller of goods is not bound to deliver them until the buyer to apply for delivery. the buyer applies for delivery.

Buyer's duty to apply for delivery.—This section reproduces section 93 of the Indian Contract Act except that for the words "in the absence of any special promise" the words "apart from any express contract" have been substituted. The words "in the absence of any special promise" have been construed to mean an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery or the necessary implication of such a stipulation from the nature of the contract as expressed. It might also arise out of usage or custom. Even if there is an obligation on the seller to inform the buyer when the goods are in a deliverable state, it is not a "special promise," though it may postpone the obligation of the buyer to apply for delivery, and on the elapse of a reasonable time to enable the goods to be procured by the seller, the buyer would be entitled and bound to apply for delivery (d). There is really no distinct authority on this point in English law, and there is no corresponding provision in the English Act, the framers of which assumed the rule to be that "it was for the buyer to take delivery, and that in the absence of any different agreement, the duty of the seller to deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery" (e). By virtue of this provision, however, the buyer in Indian law has no cause of action against the seller if he has not applied for delivery (f), and the rule is not affected by the fact that the goods are to be acquired by the seller and when they are acquired, the seller notifies to the buyer that they are in his possession: the buyer must still apply for delivery (g). When the buyer has applied for delivery, it will be a question dependent on the nature and circumstances of the particular contract as to the time within

(b) *Dixon v. Yates* (1833) 5 B. & Ad. 313, 341, 39 R. R. 489, 499. Cf. *Bunney v. Poyntz*, *supra*, example (4).

(c) *Dixon v. Yates*, *supra* at p. 339, 39 R. R. at p. 497; *Mitchell Reid & Co. v. Buldeo Doss*, *supra*, example (5).

(d) *Sivayya v. Ranganayakulu* (1935) 62 I. A. 89, 58 Mad. 670, 154 I. C. 1097, ('35) A. PC. 67.

(e) Chalmers, p. 86, citing *Smith v. Chance* (1819) 2 B. & Ald. 753, 755, per Holroyd, J., 21 R. R. 485; *Wood v.*

Tassell (1844) 6 Q. B. 234, 66 R. R. 374. The learned author adds, "It seems a pity that a more definite *prima facie* rule has not been laid down by the Act." This section supplies the deficiency.

(f) *Sivayya v. Ranganayakulu* (1935) 62 I. A. 89, 58 Mad. 670, 154 I. C. 1097, ('35) A. PC. 67.

(g) *Ganesh Das-Ishar Das v. Ram-Nath* (1928) 9 Lah. 148, 111 I. C. 498, ('28) A. L. 20.

which the seller is bound to comply with the buyer's demand (h). Moreover the application for delivery must be an effective application; if, for instance, the buyer is bound to pay the price on delivery, under section 32 he must when he applies for delivery be ready and willing to pay the price (i), and the demand must be made by the buyer or on his account. Where, therefore, a buyer of goods made an assignment of the benefit of his contract, which was found to be fictitious, and afterwards took a re-assignment of the contract and sued upon it, he was held not entitled to adopt the demand for delivery which the nominal assignee had made in the meantime, as a demand made on the buyer's account was required by section 93 of the Indian Contract Act (j).

On the other hand, when the buyer applies for delivery and the seller then fails to deliver, the seller is guilty of a breach of contract. So where the contract provided for delivery in all November on seven days notice from the buyer, and the buyer gave notice early in November, it was held that by the terms of the contract the buyer had the right to fix the date in November on which the delivery should be made, and the seller having failed to deliver as required by the notice was guilty of a breach of contract (k).

36. (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.

(h) *Sivayya v. Ranganayakulu* (1935) 62 I. A. 89, 58 Mad. 670, 154 I. C. 1097, ('35) A. P. C. 67.
(i) *Ib.*

(j) *Mulji v. Nathubhai* (1890) 15 Bom. 1.
(k) *Juggernath Khan v. Maclachlan* (1881) 6 Cal. 681.

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Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of 12 puncheons of rum, made from molasses, of which 4 were delivered. The buyer pressed for delivery of the remainder, but the seller delayed and in the meantime an Act of Parliament was passed prohibiting the distillation of spirits from molasses, and annulling all contracts for the sale of such spirits. The sellers were held liable in damages as having failed to deliver within a reasonable time (*l*).

(2) *A* having sold malt to *B* sends an order to *C* a warehouseman to hold it on account of *B*. *C* gives a written acknowledgment that he so holds it. *C* cannot set up as a defence for withholding the malt that by a usage of trade the property in the malt does not pass to the buyer until it has been measured, and that before the malt had been measured *A* had gone bankrupt (*m*).

(3) Sale of slates lying at a named wharf, £10 to be paid as a deposit and the rest of the price to be paid and the slates removed on the 23rd February. Payment was made on the 28th February, and a delivery order was signed by the seller and given to the plaintiff. On the 3rd March the original seller of the slates stopped them, as it turned out, wrongfully, and the wharfinger refused to deliver them to the plaintiff when he presented the delivery order on the 5th March. This is no delivery (*n*).

(4) Sale of goods to be delivered in the last fortnight of March. Delivery is tendered at 9 p.m. on March 31st. It is a question of fact whether this is a reasonable hour. If it is not, there is no delivery, and the buyer may repudiate (*o*).

(*l*) *Philips v. Blair & Martin* (1801) 4 Paton, Scotch Appeal Cases 256.

(*m*) *Stonard v. Dunkin* (1810) 2 Camp. 344, 11 R. R. 724.

(*n*) *Buddle v. Green* (1857) 27 L. J. Ex. 33, 114 R. R. 991.

(*o*) *Startup v. Macdonald* (1843) 6 Man. & G. 593, 64 R. R. 810, Ex. Ch. (as modified by sub-section (4)).

(5) Sale of goods for ready money. The seller packs them up in the buyer's boxes in the buyer's presence, but they remain in the seller's premises. This is not a delivery (*p*).

Place of delivery.—Sub-section (1) reproduces in a somewhat modified form section 94 of the Indian Contract Act, and corresponds to section 29 of the English Act. Subject to any terms in the contract, express or implied, to the contrary, it fixes the place at which delivery is to be made. There was no definite English authority on the point before the Sale of Goods Act was passed, and section 29 (1) of the latter Act adopts a somewhat different rule by providing that in the absence of any special agreement, "the place of delivery is the seller's place of business if he has one, and if not, his residence," unless the contract is for the sale of specific goods which, to the knowledge of the parties, are at some other place. Section 94 of the Indian Contract Act, however, correctly represented what was, at the date when it was passed, understood to be the law, and was current in English and American books of repute. Its provisions have worked well in India, and have therefore been retained.

A contract for the sale of goods, "to be delivered at any place in Bengal to be mentioned hereafter" does not fall within the operative part of this sub-section, for there is a special promise as to delivery, giving the buyer the right to fix the place anywhere in Bengal, and the words "to be mentioned hereafter" express only what the law would have implied, that the seller is entitled to reasonable notice of the buyer's choice. The case rather resembles that which is contemplated in section 49 of the Indian Contract Act; there was in fact no question under that section that the buyers had demanded delivery at the Howrah railway station, and the sellers had refused it (*q*).

Distinction between contract of sale of goods and contract to deliver goods in payment of a debt.—A contract of sale differs from a contract to pay an existing debt in specific articles (which is strictly not payment, but accord and satisfaction). In the latter case where no place of delivery is specially appointed, or is to be inferred from the usage of trade or nature of the thing, it is the duty of the debtor first to request the creditor to appoint a place, whereupon the creditor must appoint a place which is reasonable. If he does not, the debtor himself may name a reasonable place, giving notice to his creditor, and a tender of the property at that place will be good. So also, where the time of delivery is fixed, although the place is not, the same rule applies (*r*).

(*p*) *Boulter v. Arnott* (1833) 1 Cr. & M.
333.

24 Cal. 8, L. R. 23 I. A. 119.

(*r*) Per Couch, C. J., in *Dodabhai v. Sallemann* (1868) 5 B. H. C. A. C. 126, 128.

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Delivery of goods in sea transit.—This sub-section does not deal with the delivery sometimes called “symbolic,” of goods in course of transit at sea by means of the bill of lading, or the conditions under which the buyer must pay against the shipping documents, or is entitled to await actual delivery of the goods (s).

Duty of seller to dispatch.—The question what is a reasonable time is a question of fact (t); accordingly evidence may be given of the surrounding circumstances in which the contract was made in order that that question may be determined (u), and if delivery be not made within a reasonable time the buyer is not bound to accept the goods, even though the delay may not have been due to the seller’s default (v).

Delivery “as required”.—Sub-section (2) assumes that nothing further remains to be done by the buyer. When something does so remain to be done, as when goods are to be delivered “as required” or on like terms, the request for delivery is a condition precedent to the seller’s obligation to deliver. If no time is limited for making it, the request must be made within a reasonable time and if owing to excessive delay by the buyer the seller is prejudiced, the seller may be discharged (w); and in certain circumstances such delay may amount to evidence of the abandonment of the contract by mutual consent, or such conduct on the part of the buyer as to mislead the seller into believing that the contract has been abandoned, and therefore to estop the buyer from setting it up (x). But the seller cannot usually treat the mere delay of the buyer in making the request as a ground for rescinding the contract. He ought first to call upon the buyer to make the request, and if within a reasonable time after such notice the buyer fails to do so, the seller may treat the contract as repudiated by the buyer and rescind it (y).

Attornment of bailee.—It has already been seen that an “agreement of attornment” has the effect of transferring legal possession to the buyer; but that to constitute such an agreement the concurrence of all three parties, the seller, the buyer and the bailee is necessary (z).

In sub-section (3) the assent of the buyer and of the seller to the attornment is assumed; and it merely declares that there is no delivery until the bailee also assents. It is, therefore, the duty of both the seller

(s) See *E. Clemens Horst Co. v. Biddell Bros.* (1912) A. C. 18, adopting Kenedy, L. J.’s dissenting judgment in *C. A.* (1911) 1 K. B., at p. 952.

(t) S. 63.

(u) *Ellis v. Thompson* (1838) 3 M. & W. 445, 49 R. R. 679.

(v) *Jackson v. Union Marine Insurance Co.* (1874) L. R. 10

C. P. 125, Ex. Ch.

(w) See *Ross v. Shaw* (1917) 2 Ir. R. (K. B.) 367.

(x) *Pearl Mill Co. v. Ivy Tannery Co.* (1919) 1 K. B. 78.

(y) *Jones v. Gibbons* (1853) 8 Ex. 920, 91 R. R. 841.

(z) See notes to s. 33, *ante*, pp. 185, 186.

and buyer to do what is necessary to obtain the assent of the bailee (a), consequently if the buyer has done all that he is required to do, but still cannot obtain it, he may repudiate the contract (b); while if the failure to do so is due to the buyer's default, the seller may treat the delivery as duly made (c).

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It will also be observed that it is assumed that the property in the goods has passed, for the opening words are "where the goods at the time of sale are in the possession of a third person," and by section 4 (3) there is a sale only when the property in the goods is transferred from the seller to the buyer. An attornment, therefore, before the property has passed does not operate as a delivery, and is ineffectual except as an estoppel (d). A sold to B on 15th April 1931 certain quantity of wool which was in possession of C on the date of sale, subsequently C wrote a letter to B on 19th April 1931 that he had no objection to B's removing the wool from him at any time and that he would not be responsible for the same. The Privy Council held that C's letter was a plain acknowledgment by him that he held the wool on behalf of B and there was delivery within the meaning of section 36 on the 19th April (e).

Documents of title.—The difference between a bill of lading and other documents of title at common law has already been discussed (f), and there is nothing in the proviso to this section to alter that law in that respect as between seller and buyer. Although, therefore, when the goods are in the hands of a carrier by sea, the lawful issue or transfer of the bill of lading to the buyer gives him actual possession of the goods, and no attornment by the carrier is required to complete the delivery, this is not so when such a document of title as a delivery order or dock warrant is issued or transferred to him. It is only when there come into question the rights of third parties, to whom the documents have been transferred, that the position at common law is altered, and such documents are assimilated in their legal effect to a bill of lading. These matters are more fully dealt with by sec. 53.

Time of delivery.—At one time it was a question of law whether the hour was reasonable or not and elaborate rules were laid down for

(a) See *Smith v. Chance* (1819) 2 B. & Ald. 753, 21 R. R. 485 (seller in fault); *Winks v. Hassall* (1829) 9 B. & C. 372 (customs duties payable by buyer); *Buddle v. Green* (1857) 27 L. J. Ex. 33, 114 R. R. 991 (presenting delivery order).

(b) *Pattison v. Robinson* (1816) 5 M. & S. 105, at p. 110. It is no defence to the seller in an action for non-delivery to say that the refusal of the bailee to act upon the warrant was unlawful, enabling the

buyer to bring trover against him; for the buyer purchases goods and not a lawsuit, and need not bring the action; *Thol v. Hinton* (1855) 4 W. R. 26.

(c) *Bartlett v. Holmes* (1853) 13 C. B. 630, 93 R. R. 658.

(d) *Busk v. Davis* (1814) 2 M. & S. 397, 15 R. R. 288.

(e) *Prem Singh v. Deb Singh* (1948) A. P. C. 20.

(f) See the note to s. 2, p. 11 ante.

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determining this question (g). The law was altered by section 29 (4) of the English Act, which is reproduced by this section, and the question is purely one of fact (h).

Expenses of delivery.—Sub-section (5) declares the law as it was generally understood to be though there does not appear to be any authority precisely in point. If, therefore, the buyer is compelled to pay these expenses he may recover them from the seller.

The seller has to pay the expenses of delivery ; when for instance the contract is for delivery “ ex ship ” he must do all that is necessary to release the ship owner’s lien (i) and if “ from the deck ” pay all charges to be paid, such as harbour dues, to enable the goods to be removed from the deck (j). In a f.o.b. contract the seller must pay all the expenses connected with the loading of the goods. These matters do not seem to be specifically dealt with by this clause, perhaps because they will be covered either by section 14 or the general words of section 31.

On the other hand the expenses of preparing for or receiving delivery fall on the buyer (k).

37. (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

Delivery of wrong quantity.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(g) *Startup v. Macdonald* (1843) 6 Man. & G. 593, 64 R. R. 810, Ex. Ch.

(h) Cf. Indian Contract Act, s. 48. *Dinkerrai v. Sukhdajal* (1946) 48 Bom. L. R. 821, (1947) A. B. 293.

(i) *Yangtze Insurance Association v. Lukmanjee* (1918) A. C. 585, P. C.

(j) *Playford v. Mercer* (1870) 22 L. T. 41.

(k) Cf. French Civil Code Art. 1608 : “ *Les frais de la délivrance sont à la charge du vendeur, et ceux de l’enlèvement à la charge de l’acheteur, s’il n’y a eu stipulation contraire.* ”

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of cotton seed to be shipped at Alexandria and delivered in London to buyers, craft alongside ; payment in London in exchange for shipping documents. Payment was duly made by the buyers and on arrival of the ship a portion of the seed was delivered, but she then left for Hull with the remainder on board. Fourteen days later the ship returned to London and the balance of the cargo was tendered to the buyers. They refused to accept it, but retained the portion which had been delivered and claimed repayment of the price of the rejected portion. It was held that they were entitled to do so (*l*).

(2) Sale of a quantity of tins of canned fruit to be packed in cases containing thirty tins. A substantial portion was tendered in cases containing twenty-four tins. The method of packing was held to be part of the description and the buyer accordingly was entitled to reject the whole consignment (*m*).

(3) Sale of certain articles of china. The seller packed with them other articles of china, which had not been ordered and were clearly distinguishable, and sent them to the buyer. The buyer was entitled to reject the whole (*n*).

This section reproduces section 30 of the English Act. The only section in the Indian Contract Act which dealt with this matter was section 119, and that only provided for the case of the seller sending goods not ordered with goods ordered.

Short delivery.—It is obvious that, subject to the rule *de minimis non curat lex*, the seller does not fulfil his contract by tendering less than the stipulated quantity and cannot call upon the buyer to accept it, and equally the buyer cannot call for delivery of anything short of the full quantity unless he is prepared to accept the whole (*o*). If the law were otherwise either could impose a new contract upon the other ; and in effect the tender of a less quantity by the seller amounts to a new offer to this extent, that the buyer must accept and pay for or reject the whole of the amount tendered ; he cannot accept part and reject the rest (*p*), unless indeed the

(<i>l</i>) <i>Behrend & Co., Ltd. v. Produce Brokers Co., Ltd.</i> (1920) 3 K. B. 530. (<i>m</i>) <i>Moore & Co. v. Landauer</i> (1921) 2 K. B. 519, C. A. (<i>n</i>) <i>Levy v. Green</i> (1859) 1 E. & E. 969,	117 R. R. 552, Ex. Ch. (<i>o</i>) <i>Kingdom v. Cox</i> (1848) 5 C. B. 522, at p. 526. (<i>p</i>) <i>Champion v. Short</i> (1807) 1 Camp. 53, 10 R. R. 631.
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seller acquiesces in such a course, which would be an acceptance by him of a counter offer by the buyer. But by accepting the lesser quantity the buyer, although he must pay for it at the contract rate (*g*), does not preclude himself from claiming damages for short delivery (*r*), or, if he has already paid for the whole, recovering the amount apportionable to the part which was not delivered (*s*).

As to cases where there is an entire contract to be performed by delivery in instalments, see notes to the following section.

Delivery in excess of contract quantity.—Sub-section (2) deals with the case where the goods sent are of the kind ordered, but in excess of the quantity. The buyer is not bound to accept the excess, nor is he bound to put himself to the trouble of separating the contract quantity from the bulk delivered; and there is the additional reason that no goods can be said to be appropriated to the contract. "The delivery of fifteen hogsheads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him" (*t*).

He is at liberty, however, to make this choice, and may therefore accept what is in effect the new offer by the seller to sell to him the whole of the quantity delivered. If, however, he accepts the greater quantity he cannot afterwards sue for mis-delivery (*u*); and in this case also, as would appear from the wording of the sub-section, he cannot accept part of what is in excess of the contract quantity and reject the rest.

This rule also must be read subject to the maxim *de minimis non curat lex*. Accordingly where the contract was for the sale of wheat which, with a limit of variation provided for in the contract, might amount to 4,950 tons, and 55 lbs. more were tendered, but not charged for, it was held that the buyer must accept the delivery (*v*).

(*g*) *Morgan v. Gath* (1865) 3 H. & C. 748, 140 R. R. 114.

(*r*) *Garrison v. Perrin* (1857) 2 C. B. N. S. 681, 109 R. R. 830; *Beck & Co. v. Szymanowski* (1924) A. C. 43. In this case the contract was for the sale of a quantity of sewing cotton to be accepted and paid for and to be deemed in all respects according to the contract unless objected to within 14 days after delivery. Later the cotton was found to be less than the stipulated quantity. It was held that the condition applied to quality, not quantity, and the buyer was entitled to damages for short delivery. He might still have been so entitled, even if the condition had applied to quantity;

per Lord Wrenbury, at p. 52. The buyer by accepting when he is entitled to reject waives the condition but may still treat the breach of it as a breach of warranty; cf. *Barker Junior & Co. v. Agius, Ltd.* (1928) 43 T. L. R. 751, 33 Com. Cas. 120 and s. 13 (2).

(*s*) *Behrend v. Produce Brokers Co.* (1920) 3 K. B. 530.

(*t*) *Cunliffe v. Harrison* (1851) 6 Ex. 903, 906, 86 R. R. 543, per Parke, B.; cf. *Hart v. Mills* (1846) 15 M. & W. 85, 71 R. R. 578.

(*u*) So held by Acton, J., in *Gabriel Wade & English, Ltd. v. Arcos, Ltd.* (1929) 34 Ll. L. Rep. 306.

(*v*) *Shipton Anderson & Co. v. Weil Brothers* (1912) 1 K. B. 574.

It must be remembered, however, that the burden of proving that a breach of contract falls within the principle *de minimis non curat lex* is on the party seeking to excuse the breach (*w*).

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Delivery of contractual goods together with others.—Sub-section (3) replaces, and modifies in favour of the buyer, section 119 of the Indian Contract Act, which limited the buyer's right to reject to cases where "there is risk or trouble in separating the goods ordered from the goods not ordered." This was based on the case of *Levy v. Green* (*x*) in which Byles, J. (*y*), said "I do not say that, in all cases where the goods ordered are sent together with others not ordered, the vendee would have a right to refuse to accept any; but, if there is any danger or trouble attending the severance of the two, or any risk that the vendee might be held to have accepted the whole if he accepted his own, he is at liberty to refuse to accept at all."

Accordingly where a contractor for the supply of coal sent coals partly according to contract and partly not, and mixed them all together in delivery, it was held that the whole quantity so delivered must be considered not according to contract (*z*).

The present sub-section, however, is not subject to this limitation and the buyer is not bound to accept the goods, however easy it may be to separate the goods which are contracted to be sold from the others, for "mixed with" means no more than "accompanied by" (*a*).

Goods of inferior quality.—Where some of the goods delivered, though answering the description, are not of merchantable quality, it is clear that the buyer may reject the whole (*b*), but it is doubtful whether he can reject those only which are not of merchantable quality and keep the rest. According to a decision in Scotland (*c*) the words "of a different description" must be construed strictly, so that where all the goods delivered were of the specified description, but some were of inferior quality, the buyer's remedy was to reject all; he could not under this sub-section reject those only which were of inferior quality, and keep the rest.

(*w*) *Ronaasen & Son v. Arcos, Ltd.* (1932) 37 Com. Cas. 291, C. A.

(*x*) *Supra*, example (3).

(*y*) 1 E. & E., at p. 976, 117 R. R., at p. 556.

(*z*) *Nicholson v. Bradfield Union* (1866) L. R. 1 Q. B. 620.

(*a*) *Moore & Co. v. Landauer* (1921) 1 K. B. 73, per Rowlatt, J. Affirmed (1921) 2 K. B. 519, C. A., *supra*, example (2); *London Plywood and Timber Co. Ltd. v. Nasik Oak Extract Factory & Steam Sawmills Co., Ltd.* (1939) 2

K. B. 343.

(*b*) *Jackson v. Rotax Motor and Cycle Co.* (1910) 2 K. B. 937, C. A. (rejection of one instalment where the contract was severable); cf. *Rylands v. Kreitman* (1865) 19 C. B. (N. S.) 351.

(*c*) *Aitken Campbell & Co. v. Boullen* (1908) Sess. Cas. 490. The buyer's right of rejection in Scotland is wider than in England, even under the Sale of Goods Act. Mere inferiority of quality does not entitle the buyer to reject in England.

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Permissible variations.—The seller may protect himself by qualifying the specific quantity mentioned by the use of such words as “about” or “more or less” or the contract may fix a definite limit of variation as by “5% more or less;” and such variations may be imported by custom. Where the contract itself fixes the limits of variation, those limits must be observed (*d*), in other cases it must depend upon the particular circumstances of the case whether the amount tendered is or is not a substantial compliance with the contract (*e*).

38. (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

Instalment
deliveries.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of 25 tons of pepper October/November shipment. The sellers shipped 20 tons in November and five tons in December. The buyers were entitled to reject the whole 25 tons (*f*).

(2) Sale of 200-300 tons of coal to be shipped as early as possible by a named ship or other vessel. The named ship was not available and the seller shipped 152 tons on another ship, informing the buyer that he had done so and that he had drawn on him for the price and proposing to ship the remainder later. The buyer made no reply to this communication. The ship was lost. In an action by the seller for the price it was held that the buyer had impliedly assented to the shipment of the smaller quantity as an instalment and was liable to pay for it (*g*).

Instalment deliveries.—The rule laid down by sub-section (1) is really a corollary to section 37 (1). Neither seller nor buyer can claim to

(*d*) *Payne and North v. Lillico & Sons* (1920) 36 T. L. R. 569; cf. *Thornett and Fehr and Yuills, Ltd.* (1921) 1 K. B. 219.
(*e*) See Benjamin on Sale, pp. 734-746, where the cases on these points are

collected.

(*f*) *Reuter v. Sala* (1879) 4 C. P. D. 239, C. A.

(*g*) *Richardson v. Dunn* (1841) 2 Q. B. 218.

make or demand delivery of less than the full quantity and neither therefore can, in the absence of agreement, insist that delivery should be made by instalments (*h*).

Such an agreement, however, is frequently made expressly, and may also be inferred from the circumstances of the case, *e.g.*, from the conduct of the parties in delivering and accepting an instalment, or from the nature of the contract, *e.g.*, when it is obvious that the full quantity of the goods cannot be delivered in one delivery (*i*).

Entire contracts.—Where there is an agreement for delivery by instalments, but the price is made payable on complete delivery, or where there is no stipulation that it shall be paid before complete delivery, the contract is still an entire contract (*j*), though divisible in performance (*k*), and “where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered (*l*), because the purchaser may, if the vendor fails to complete his contract, return the part delivered. But if he retains the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered” (*m*). In other words, such a case falls within section 37 (1), and the obligation on the buyer to pay at the contract rate is substituted for the payment of the value.

On the other hand, the buyer must accept instalments tendered in the due course of delivery (*n*), though this will not preclude him from rejecting a subsequent instalment, if he is otherwise entitled to do so (*o*), and if he wishes so to do, he may reject the whole, if the seller can no longer make a delivery to satisfy the contract (*p*).

(*h*) *Reuter v. Sala*, *supra*, example (1); *Kingdom v. Cox* (1848) 5 C. B. 522; *Sadasook Kothari v. Chattram Rambilash* (1925) 29 Cal. W. N. 808, 88 I. C. 910, ('26) A. C. 218.

(*i*) *Colonial Insurance Co. of New Zealand v. Adelaide Insurance Co.* (1886) 12 App. Cas. 128, at pp. 138-139, P. C.

(*j*) *i.e.* the whole of what is to be done on one side is the consideration of the whole of what is to be done on the other: per Bramwell, L. J.; *Honck v. Muller* (1881) 7 Q. B. D. 92, at p. 100.

(*k*) *Ballantyne v. Cramp* (1923) 129 L. T. 502, per McCardie, J., approving the statement in Benjamin on Sale, p. 747. In such a case the Statute of Limitation runs from the delivery of the final instalment; *Ganesh Das Ishar Das v. Ram Nath* (1928) 9 Lah. 148, 111 I. C. 498, ('28) A. L. 20.

(*l*) This was settled in 1805; *Waddington v. Oliver*, 2 B. & P. N. R. 61, 9 R. R. 614.

(*m*) *Oxendale v. Wetherell* (1829). B. & C. 386, 33 R. R. 207, per Parke, J.; cf.: *Burn & Co. v. Morvi State* (1926) 30 Cal. W. N. 145, 90 I. C. 52, ('25) A. P. C. 188.

(*n*) *Brandt v. Lawrence* (1876) 1 Q. B. D. 344, C. A. Here each instalment had to be separately paid for but the principle is the same.

(*o*) *Jackson v. Rotax Motor & Cycle Co.* (1910) 2 K. B. 937, C. A.

(*p*) The seller in all these cases has the right to make a fresh tender if he can do so within the contract time; *Borrowman v. Free* (1878) 4 Q. B. D. 500, C. A. cf. *British & Beningtons, Ltd. v. North Western Cachar Tea Co.* (1923) A. C. 48, at p. 71, per Lord Sumner.

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Next, the contract may provide that each instalment shall be separately paid for. In this case the buyer must duly accept and pay for it (g), but the contract may still, from its nature, be entire (r): so that the seller's failure to complete full delivery may amount to a total failure of consideration, and entitle the buyer to return all instalments that he has received and recover all sums that he has paid; for when the consideration is entire, by failing partially it fails entirely (s). The buyer therefore is not, in such a case, relegated to a mere right to sue for damages (t). Conversely, the seller may insist on the buyer's accepting the whole, and, on the buyer's default, he may recover for the parts delivered.

Severable contracts. Lastly the contract may provide for delivery by instalments, and payment for each instalment, and be of such a nature that each delivery is really like a delivery under a separate contract, to be paid for separately. The seller must then deliver instalments according to the contract, and the buyer accept and pay for them (u), but in case of a failure by either party to fulfil his obligations in respect of one instalment, "the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract" (v), for in such contracts the consideration is divided, and such a failure by either party amounts to but a partial failure of consideration, and therefore does not preclude him from insisting on the other party going on with the contract, subject to his obligation to pay "compensation" for the partial breach (w). On the other hand, the breach may occur in such circumstances, or be of such a nature, as to amount to a repudiation of the contract entitling the other party to put an end to it pursuant to the provisions of section 39 of the Indian Contract Act (x): and indeed such a breach is but a particular instance of the much wider principle laid down in that section. The rule

(g) *Brandt v. Lawrence*, *supra*, note (n); *Workman Clark & Co., Ltd. v. Lloyd Brazilleno* (1908) 1 K. B. 968, C. A. (action to recover the instalment price in a shipbuilding contract). This is covered by the use of the word "compensation" in sub-section (2). See at p. 979, per Farwell, L. J. "It is particularly to be noticed that in this provision the term 'compensation' is used instead of the term 'damages,' which is the usual correlative of the term breach, the reason being, I think, that the provision was intended to cover both cases where damages properly so called were recoverable, and cases where the breach consisted in non-payment of the price of an instalment of the goods."

(r) For instance, a contract for the sale of a complicated machine, or a book brought out in parts.

(s) *Chunter v. Leese* (1839) 5 M. & W.

698, at p. 702, 51 R. R. 548, 600, Ex. Ch. See also sections 7 and 8 and the notes thereto.

(t) There does not appear to be any case expressly in point, but the principle is clear, and perhaps the absence of authority is due to the fact that no one has ventured to dispute it. The principle is embodied in s. 39 of the Indian Contract Act.

(u) See, for instance, *Howell v. Evans* (1926) 134 L. T. 570.

(v) See per Thesiger, L. J., in *Reuter v. Sala* (1879) 4 C. P. D., at p. 246. The parties may, needless to say, stipulate to the contrary: *Ebbw Vale Steel Co. v. Blaina Iron Co.* (1901) 6 Com. Cas. 33, C. A.

(w) As to the meaning of "compensation" see note (g), above.

(x) See Pollock and Mulla, pp. 261-272.

of law is clear enough, "where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say 'I am not going on to perform my part of it, when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct'" (y) : the difficulty is in its application, and the sub-section declares that this must depend upon the particular circumstances of each case. No hard and fast rule, therefore, can be laid down.

Failure to pay for an instalment.—It does, however, appear from the cases that a mere refusal or failure by the buyer to pay for one or more instalments, unaccompanied by any other act, does not amount to a repudiation of the contract by the buyer (z). Even insolvency, by itself, does not entitle the seller to rescind (a), though he may refuse to deliver, unless he is paid for instalments already delivered, and receives cash for subsequent instalments (b). It is, however, a fact to be taken into consideration in determining the question whether or not the buyer intends to carry out the contract further (c), in accordance with the general rule that in each case all the circumstances have to be considered in determining whether there is evidence on which a jury may find that there has been a repudiation of the contract. So where a buyer of a quantity of straw which was to be delivered in instalments and paid for on delivery said to the seller, in effect : "You may bring your straw, but I will not pay you on delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you" it was held he had shown an intention to repudiate the contract, and that the seller might treat it as at an end (d). Here the breach showed a prospective refusal to pay for any instalment according to the contract, and in any case where such a refusal can be inferred, the seller may treat the contract as rescinded : it will be more easy to infer it in cases of insolvency of the buyer than in

(y) Per Lord Blackburn, *Mersey Steel and Iron Co. v. Naylor Benzon & Co.*, (See next note), at p. 443.

(z) *Freeth v. Burr* (1874) L. R. 9 C. P. 208 ; *Mersey Steel & Iron Co. v. Naylor Benzon & Co.* (1884) 9 App. Cas. 434 ; *Payzu Limited v. Saunders* (1919) 2 K. B. 581, C. A. ; *Steinberger v. Atkinson & Co.* (1915) 31 T. L. R. 110 ; *Sooltan Chund v. Schiller* (1878) 4 Cal. 252 ; *Simson v. Virayya* (1886) 9 Mad. 359 ; *Sundar Singh v. Krishna Mills Co.* (1914) Punj. Rec. No. 63, p. 214, 23 I. C. 91. Still less does mere request for extension of credit entitle the seller to rescind ; *In re Phoenix Bessemer Steel Co.* (1876) 4 Ch. Div. 108, C. A. ; *Rash Behary Shaha v. Nritaya*

Gopal Nundy (1906) 33 Cal. 477.

(a) Cf. section 54 and notes thereto.

(b) See section 47 and notes thereto.

(c) *Ex parte Chalmers*, L. R. 8 Ch. App. 289, 294 ; *Bloomer v. Bernstein* (1874) L. R. 9 C. P. 588 ; *Mess v. Duffus* (1901) 6 Com. Cas. 165. If the trustee or official assignee does not elect to complete the contract the seller may treat it as repudiated ; *Ex parte Stapleton* (1879) 10 Ch. Div. 586 ; cf. *Morgan v. Bain* (1874) L. R. 10 C. P. 15.

(d) *Withers v. Reynolds* (1831) 2 B. & Ad. 882, 36 R. R. 782 ; cf. *Burn & Co. v. Morvi State* (1926) 30 Cal. W. N. 145, 90 I. C. 52, ('25) A. P. C. 188.

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others, and less easy in cases where the buyer is putting forward some ground in good faith for failing or refusing to pay.

Failure to deliver or accept an instalment.—As regards the effect of the failure of the seller to deliver, and the buyer to accept, in whole or in part one or more instalments, no general rule can be laid down : and efforts to do so in the past have led to scarcely reconcilable decisions (e). The Act has laid down the true principle, that each case must be judged on its merits, and decisions on one set of circumstances are not of much assistance in other and different circumstances. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and the nature of the transaction, “to evince an intention not to be bound by the contract” (f). It seems, however, with great submission, that the intention which is material is not that with which the contract is broken, but that with which it was made. Parties can undoubtedly make any term essential or non-essential ; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not discharge him, but shall only entitle him to compensation in damages for the particular breach. Omission to make the intention clear in this respect is the cause of the difficulties, often considerable, which the Courts have to overcome in this class of cases.

Effect of breach which amounts to repudiation.—Where the breach in fact amounts to a repudiation, the other party may, as provided by section 60, accept the repudiation and rescind, and bring his action for damages : and the party in default cannot rely on the fact that all conditions precedent have not been performed, for instance, that no further goods were tendered by the seller (g), nor turn round and say that if he had not repudiated, the other party would not have been in a position to carry out his contract. Thus, in a recent case, in which there was a contract for the sale of hatter's fur, deliverable by instalments, the buyers accepted an instalment, though owing to some defects in the fur they might, if they had discovered the defects, have rejected it. Afterwards, for reasons unconnected with the first instalment they gave notice that they would not accept further deliveries, and no further deliveries were tendered by the sellers. It was held by Greer, J., whose decision was affirmed by

(e) Contrast, for instance, *Hoare v. Rennie* (1859) 5 H. & N. 19, 120 R. R. 453, and *Honck v. Muller* (1881) 7 Q. B. D. 92, C. A., and cf. *Volkart v. Rutnavelu Chetti* (1894) 18 Mad. 63, with *Jonassohn v. Young* (1863) 4 B. & S. 296, 129 R. R. 750, and *Simpson v. Crippin* (1872) L. R. 8 Q. B. 14.

(f) *Freeth v. Burr*, *supra*, p. 169, note (z), L. R. 9 C. P. 213-214; *Maple Flock Co., Ltd. v. Universal Furniture Products (Wembley), Ltd.* (1934) 1 K. B. 148.

(g) *Cort v. Ambergate Ry. Co.* (1851) 17 Q. B. 127, 85 R. R. 369; *Ripley v. McClure* (1850) 5 Ex. 140.

the Court of Appeal, that the defective delivery was, in the circumstances a severable breach, which would not have entitled the buyers to rescind the contract, and refuse to accept further deliveries, and their conduct was a wrongful repudiation of the contract. It was, therefore, no defence to the buyers to say that if they had not repudiated, the sellers would have tendered in the next delivery fur of the same kind as that which they had delivered in the first instalment, and the buyers would have been entitled to reject it (*h*).

But a breach in respect of one delivery may be evidence from which it can be properly inferred that similar breaches will be committed in relation to subsequent deliveries, so that the contract may be rescinded by the other party. The mere fact that the party in default contends that he is performing his contract and may in fact be intending to perform the remainder of it, will not suffice to deprive the other party of his right to rescind (*i*): nor will the existence of a clause which frequently occurs in such contracts, that "each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments" (*j*).

Instalments not specified.—Sub-section (2) in terms deals only with cases where the instalments are "stated," but the principle is the same in cases where they are not specified (*k*): though in the latter case a further question may arise whether any given instalment is sufficient to be a substantial performance of the contract. This again is a pure question of fact (*l*).

Breach in respect of one instalment discharges contract with respect to that instalment.—The effect of a breach by either party in making or taking delivery of an instalment is to discharge the contract to that extent, subject to the defaulting party's liability to pay damages. Its delivery cannot afterwards be enforced or demanded (*m*).

(*h*) *Taylor v. Oakes, Roncoroni & Co.* (1922) 127 L. T. 267, C. A. In this case there was considerable discussion of the case of *Braithwaite v. Foreign Hardwood Co.* (1905) 2 K. B. 543, C. A., as to which see notes to s. 60, but *Taylor's* case does not depend upon the correctness of the decision in *Braithwaite's* case and is clearly right in principle.

(*i*) *Millars' Karri & Jarrah Co. v. Weddel & Co.* (1908) 100 L. T. 128; *Chhedilal v. Brit-over, Ltd.*, 52 C. W. N. 45.

(*j*) *Robert A. Munro & Co. v. Meyer* (1930) 2 K. B. 312, at p. 332.

(*k*) See *Coddington v. Paleologo* (1867) L. R. 2 Ex. 193, at p. 197; *Reuter v. Sala* (1879) 4 C. P. D. 239, C. A.; *Jackson v. Rotax Motor & Cycle Co.* (1910) 2 K. B. 937, C. A.

(*l*) For illustrations see *Barningham v. Smith* (1874) 31 L. T. 540; *Calaminus v. Dowlais Iron Co.* (1878) 47 L. J. Q. B. 575.

(*m*) *Simpson v. Crippin* (1872) L. R. 8 Q. B. 14. Compare *Ireland v. Merryton Coal Co.* (1894) 21 S. C. 989 (buyer must buy in against the seller on his separate breach).

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39. (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, ^{Delivery to carrier or wharfinger.} delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

Examples.—The section may be illustrated by the following examples :—

(1) The buyer living near Bristol ordered goods of the seller to be sent from London by any conveyance for Bristol. The seller sent the goods to a wharf where he was informed that they would be conveyed to Bristol by the ship “Commerce” and accordingly notified the buyer that they would be sent by that ship. That ship, however, was fully laden and, unknown to the seller, the goods were sent by another ship and were subsequently lost. The buyer was liable to pay the price of the goods (n).

(2) The seller sent goods by a carrier who notoriously professed not to answer for goods worth more than £5 unless specially entered and paid for. The seller omitted to make any special entry and the goods never reached the buyer. The seller failed to recover the price in an action for goods sold and delivered (o).

(n) *Cooke v. Ludlow* (1806) 2 B. & P. N. R. 119. | (o) *Clarke v. Hutchins* (1811) 14 East, 475, 13 R. R. 283.

Delivery to wharfinger or carrier.—In England it has been for more than a century “a proposition as well settled as any in law that, if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser” (p) and the Act applies the same rule to delivery to a wharfinger, as did section 91 of the Indian Contract Act, which sub-section (1) of this section replaces. As has been seen already (q), delivery to the carrier will, unless the seller reserves the right of disposal, pass the property in the goods to the buyer: and the general result of delivery to the carrier or wharfinger is that the goods are then at the buyer’s risk the carrier or wharfinger is his agent, and he alone may sue the latter for damages done by him, to the goods, or failure to deliver them. The carrier, shortly, is the buyer’s agent to receive the goods, and delivery to him accordingly constitutes a receipt within the meaning of the Statute of Frauds, but though he is the buyer’s agent to receive, he is not his agent to accept the goods (r). The rule, however, is a *prima facie* rule, and may be modified by express contract (s).

The sub-section must be read subject to sections 50-52, as regards an unpaid seller’s rights to stop the goods in transit.

Duty of seller on delivering goods to a carrier.—Sub-section (2) is in the nature of a proviso to the previous sub-section, but the qualification to the general rule which it embodies may be regarded as old as the general rule itself, for in 1811 the Court of King’s Bench treated as unquestionable law the proposition that it “was the (seller’s) duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in the case of a loss the (buyer) might have his indemnity against the carriers” (t).

Under this sub-section the buyer may apparently treat the delivery to the carrier as an invalid or valid delivery to himself, and in the latter case hold the seller liable for damages for his breach of duty. This appears to be an extension of section 91 of the Indian Contract Act.

(p) *Dutton v. Solomonson* (1803) 3 B. & P. 582, 7 R. R. 883.

(q) See s. 23 (2).

(r) Blackburn on sale, p. 17.

(s) See *Dunlop v. Lambert* (1839) 6 Cl. & Fin. 600, at pp. 620, 621, per Lord Chelmsford, 49 R. R. 143; *Calcutta Co. v. De Mattos* (1863) 32 L. J. Q. B. 322, at s. 328, per Blackburn, J., 139 R. R. 752; *Sadasook Kothari v. Chaitram Rambilash* (1925) 29 Cal. W. N. 808, 88 I. C. 910, ('26) A. C. 218 (“delivery free at buyer’s mill by rail or steamer or flat.” Placing the goods on the flat was held not to be a delivery to the buyer). The

goods must be delivered to the carrier for transmission to the buyer. “The use of the words *prima facie* shows that even if there be delivery to the carrier for transmission to the buyer, circumstances may exist which would prevent such delivery from amounting to delivery to the buyer;” *Jagadish Prosad v. Produce Exchange Corporation Ltd.* (1946) A. C. 245.

(t) *Clarke v. Hutchins*, *supra*, example (2). The plaintiff was non-suited at the trial, and the Court would not even grant a rule nisi to set aside the non-suit; *Narain Singh v. Tulsi Ram* ('37) A. L. 785.

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The sub-section provides more clearly than did that section for the case of the buyer authorizing a different procedure by the seller : but even under that section it was held that, if the buyer arranged that valuable goods should be sent by the seller at "owner's risk," the property passed to the buyer on delivery to the railway company (u). Under this sub-section no argument to the contrary could be advanced.

Responsibility of carriers.—In India the following requirements are established by general legislation :—

Under section 3 of the Common Carriers Act III of 1865, no carrier is liable for loss of certain goods above Rs. 100 in value, unless the person delivering the goods shall have expressly declared the value and description thereof. Similarly, under sections 72 and 73 of the Indian Railways Act IX of 1890, no railway company is liable to pay more than a specified value for the loss or destruction of certain animals, unless the person delivering the animals should have declared them to be of a higher value. Accordingly, consignors neglecting to make the required declarations do so at the peril of losing their right to recover the price from the buyer if the goods miscarry.

Sea Transit.—Sub-section (3) like the previous sub-section must be read as a proviso to sub-section (1), but its exact scope is not very clear. It obviously does not apply to a c.i.f. contract, under which it is the obligation of the seller to effect the insurance, nor to an ex-ship contract, as in that case the buyer has no insurable interest in the goods while at sea. Nor before the English Act was it ever thought or contended that the seller under a contract to sell goods f.o.b. was under any obligation to the buyer to give such notice to the buyer as to enable him to insure the goods, under peril of finding that the goods were at his risk, so that, presumably, he might fail to recover the price if they were lost. The sub-section, in fact, which reproduces section 32 (3) of the English Act, lays down a rule of Scots law, which had no application or counterpart in English law : and the English Act had been in operation for nearly twenty years before a case arose in which the Courts had to consider this sub-section.

In that case (v) the contract, dated June 27th, 1912, was for the sale of 200 bags of rice f.o.b. Antwerp, to be shipped as required by the buyers. The buyers on August 9th sent the sellers instructions to ship the rice for Odessa and to pay the freight on their account, leaving it to the sellers to select the ship. They shipped it on August 24th, but the ship stranded and was lost on August 25th. The buyers knew nothing of the shipment until August 29th, when the bill of lading was tendered to them. They

(u) *Alagappa Chetty & Co. v. Roopchand Chabildase & Son* (1920) 57 Mad. L. J. 110, 117 I. C. 136, ('29) A. M. 685.

(v) *Wimble Sons & Co. v. Rosenberg & Sons* (1913) 1 K. B. 279, (1913) 3 K. B. 743, C. A.

refused to pay the price, and when sued by the sellers (*w*), relied upon the sub-section. Bailhache, J., before whom the case was tried, held that the sub-section did not apply to a f. o. b. contract and gave judgment in favour of the sellers. On appeal the Court of Appeal were divided in opinion: Vaughan Williams, L. J., holding that the sub-section applied and the sellers had not given such notice as to enable the buyers to insure: Buckley, L. J., that the sub-section applied, but the buyers had sufficient information to enable them to insure, so there was no obligation on the sellers to give notice; and in any case the contract itself was sufficient notice: Hamilton, L. J., that the sub-section did not apply to a f.o.b. contract, and if it did the contract itself gave sufficient notice. A later attempt by a buyer under a f. o. b. contract to rely on the section also failed, on the ground that he had sufficient material to enable him to insure (*x*).

As regards the Scottish cases, as pointed out by Hamilton, L. J. (*y*), many are decided on the relationship of principal and agent, and none is decided on f.o.b. contracts in terms: and in all the facts stated are consistent with the goods having been sent on the terms of carriage forward, or freight payable on delivery, or with the sender charging prepaid freight to the receiver in account: and in those which deal with contracts of sale, the seller's obligation to send the goods arises not on the sale itself, but only incidentally to it, as part of a simultaneous mandate given by the buyer to the seller. There are therefore contracts to which the section can apply, even if it were ultimately held not to apply to a f.o.b. contract. As the law at present stands in England, however, it must be taken that the sub-section imposes on the seller in such cases an onerous obligation which did not exist at common law, though hitherto the buyer has not been able to take advantage of it.

Contracts involving sea transit.—The usual contracts of sale which involve the carriage of goods by sea are three, namely, c.i.f., f.o.b. and ex-ship: and it will be convenient here to indicate the leading characteristics of each. The parties may in any given case vary the usual terms of such contracts or add others to them, or incorporate in one form of contract terms which are usually only found in another (*z*). It is therefore only possible to deal with the main features of these different contracts in their most common form.

The c.i.f. contract.—This contract is a contract for the sale of goods at a price which covers cost, insurance and freight, and unless

(*w*) The plaintiffs in fact were brokers for the seller, a foreign principal in Antwerp, but it was agreed that they should be treated as sellers.

(*x*) *Northern Steel & Hardware Co. v. John Batt & Co. (London), Ltd.* (1917) 33

T. L. R. 516, C. A.

(*y*) (1913) 3 K. B., at p. 762.

(*z*) See for instance *The Parchim* (1918) A. C. 157, where the contract was something between a c. i. f. and f. o. b. contract.

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otherwise expressed is a contract for the sale of goods to be carried by sea (a).

Under such a contract "the seller in the absence of any special provisions to the contrary is bound by his contract to do six things. First to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract (b). Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract (c). Fourth, to arrange for an insurance upon the terms current in the trade (d) which will be available for the benefit of the buyer. Fifthly, with all reasonable dispatch (e) to send forward and tender to the buyer these shipping documents, namely, the invoice (f), bill of lading and policy of assurance (g), delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to

(a) *L. Sutro & Co. v. Heilbut Symons & Co.* (1917) 2 K. B. 348, C. A.

(b) This includes the duty to ship goods of the contractual quantity and within the time stipulated by the contract if a time be specified; *Landauer & Co. v. Craven & Speeding Bros.* (1912) 2 K. B. 94; *Harland & Wolff v. Burstall* (1901) 6 Com. Cas. 113, 84 L. T. 324.

(c) Cf. *Lecky v. Ogilvy* (1897) 3 Com. Cas. 29, C. A. (a case where the wrong Tripoli was made the port of destination). If the contractual destination is, e.g., a wharf, the seller must procure a contract for delivery at that wharf, and so include any necessary lighterage charges as well as the ocean freight; *Acme Wood Co. v. Sutherland Innes Co.* (1904) 9 Com. Cas. 170.

(d) The seller, therefore, is not bound to insure against war risks, and the policy may therefore properly include the f.c. & s. clause. *Groom, Ltd. v. Barber* (1915) 1 K. B. 316; *Weis & Co., Ltd. v. Crédit Colonial et Commercial (Antwerp)* (1916) 1 K. B. 346; *Law and Bonar Ltd. v. British American Tobacco Co.* (1916) 2 K. B. 605. In the first mentioned case a term in the contract "war risk for buyer's account" was held to mean that war risk was the concern of the buyer alone, not that the seller must insure against it at the buyer's expense. The seller must insure for an amount which reasonably represents the value of the goods at the port of shipment, but not necessarily at the port of destination; *Tamvaco v. Lucas* (1861) 1 B. & S. 185, 124 R. R. 517. Where insurance had to be effected at the ruling rate and the sellers effected insurance on a belligerent ship for which a much higher rate of

premium was payable, it was held that the sellers could not hold the buyers to account for the abnormal premiums asked in respect of such a vessel; *Oulu Osakayetio v. Arnold Laver & Co.* (1940) 1 K. B. 750.

(e) i.e., after shipment; *Sanders Bros. v. Maclean & Co.* (1883) 11 Q. B. D. 327, C. A.; *Groom v. Barber*, *supra*.

(f) The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance and the freight, as the case may be) and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery; *Ireland v. Livingstone* (1872) L. R. 5 H. L. 395, 406; *Biddell Bros. v. E. Clemens Horst* (1911) 1 K. B. 214, 220. If the invoice includes items not properly chargeable, the documents are not in order, and the buyer may reject them; *M. B. Mehta & Co. v. Joseph Heureux* (1924) 48 Bom. 531, 80 I. C. 766, (24) A. B. 422.

(g) A broker's cover note or certificate of insurance is not sufficient; *Wilson Holgate & Co. v. Belgian Grain Co.* (1920) 2 K. B. 1; *Diamond Alkali Export Corporation v. Bourgeois* (1921) 3 K. B. 443; *Scott v. Barclays Bank* (1923) 2 K. B. 1, C. A., and the policy must cover only the goods mentioned in the invoice and bill of lading; *Manbre Saccharine Co. v. Corn Products Co.* (1919) 1 K. B. 198, 205. If the buyer accepts a certificate, the seller impliedly warrants the truth of the statements contained in it, and undertakes to produce the policy; *Harper & Co. v. Mackenzie & Co.* (1925) 2 K. B. 423.

payment of their price.....If no place be named in the c.i.f. contract for the tender of the shipping documents, they must *prima facie* be tendered at the residence or place of business of the buyer" (h).

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As regards the bill of lading, it must be in such form that the buyer may not only be able to obtain possession of the goods on arrival but also to recover according to its terms from the carrier for loss or damage occurring at any stage of the transit. It must therefore cover the whole transit of the goods from the port of shipment to the port of arrival (i). Further it must be procured on shipment (allowing a reasonable latitude) (j), be correctly dated (k) and be for the contractual quantity of the goods (l). Apart from express agreement, a delivery order or ship's release will not suffice as a substitute for the bill of lading (m) and it is at least doubtful whether a bill of lading in the form which is coming more into vogue received for shipment on board—"instead of "shipped on board—" is a valid shipping document (n). Even if it is, and the contract provides for shipment by a certain date, this provision must be strictly complied with (o).

It will be seen, therefore, that it is an essential part of the contract that the seller should tender the documents. If he does not do so, he fails to perform his contract and cannot enforce it (p). On the other hand if he does do so, the buyer's obligation is to take them up and, on his taking them up, he is bound to pay the price according to the terms of the contract; and he is not discharged from the one obligation or the

(h) Lord Atkinson, *Johnson v. Taylor Bros. & Co., Ltd.* (1920) A. C. 144. As to Indian Cases, see *Steel Brothers & Co., Ltd. v. Dayal Khatao & Co.* (1923) 47 Bom. 924, 87 I. C. 67, ('24) A. B. 247; *Bubby Hurry & Co. v. M. Hertz & Co. Ltd.* (1923) 4 Lah. 215, 73 I. C. 421, ('23) A. L. 541. (i) *Hansson v. Hamel & Horley, Ltd.* (1922) 2 A. C. 36.

(j) *Landauer & Co. v. Craven & Speeding Bros.* (1912) 2 K. B. 94; *Foreman & Ellams, Ltd. v. Blackburn* (1928) 2 K. B. 60.

(k) *Finlay & Co. v. Kwik Hoo Tong* (1929) 1 K. B. 400, C. A.

(l) *In re Keighley Maxted & Bryan & Co.* (1894) 70 L. T. 155, C. A.; *Libau Wood Co. v. H. Smith & Sons, Ltd.* (1930) 37 Ll. L. R. 296.

(m) *Heilbut Symons v. Harvey* (1922) 12 Ll. L. R. 455.

(n) *Diamond Alkali Export Corporation v. Bourgeois* (1921) 3 K. B. 443; *Malmberg v. Evans* (1924) 30 Com. Cas. 107. But see *Weiss v. Produce Brokers Co.* (1921) 7 Ll. L. R. 211, C. A. "Received for shipment" would seem to be re-

cognized as a good bill of lading by the Carriage of Goods by Sea Act, 1924, (14 & 15 Geo. 5 c. 22) for it expressly provides by Article III, rule 7, that the shipper may demand a "shipped" bill of lading; cf. *Marlborough Hill (Ship) v. Cowan & Sons* (1921) 1 A. C. 444, P. C. This unsatisfactory position illustrates the difficulty found by the law in accommodating itself to changes in mercantile usage.

(o) *Suzuki v. Burgett & Newsum* (1922) 10 Ll. L. R. 223.

(p) *Orient Co. v. Brekke & Howland* (1913) 1 K. B. 531; *Happe v. Manasseh* (1915) 32 T. L. R. 112, C. A.; *In re Denbigh Cowan & Co. and Atcherley & Co.* (1921) 125 L. T. 389, 90 L. J. K. B. 836, C. A. cf.; *Bendit v. Prudhomme* (1924) 48 Mad. 538, 546, 551, 87 I. C. 681, ('25) A. M. 626; *Durga Datt Jagan Nath v. Wood & Co.* (1933) 142 I. C. 413, ('33) A. L. 453 (Parties may agree that in Newhall shipping documents the sellers could substitute their own invoice in which case the invoice would be legally tenable).

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other by reason of the fact that the goods are lost or for some other reason cannot be delivered, or that he has not had an opportunity of examining them (q). And although it may be necessary for the seller, in order that he may so fulfil his contract by tendering the documents, himself to ship the goods and effect the contract of affreightment and insurance, this is not always the case. He may, for instance, buy documents for goods already afloat, and tender them, and the buyer will be equally bound to accept them and pay the price as if the seller had himself shipped the goods (r). The buyer may justify his refusal to take up the documents, though otherwise valid, if further performance of the contract involves dealings with an enemy (s) or by showing that the documents, though apparently in order, are really not so, for instance that the bill of lading is not correctly dated and if it bore its correct date would be an invalid document (t), or perhaps by proving that the goods shipped were not in accordance with the contract, though this does not appear from the documents themselves (u). Otherwise he must take up the documents and pay the price, though this will not preclude him from rejecting the goods and recovering the price if it be found on arrival that they are not in accordance with the contract (v).

Accordingly "the best way of approaching the consideration of all questions on c.i.f. sales is to realize that this form of the sale of goods

(q) *Weiss & Co., Ltd. v. Crédit Colonial et Commercial (Antwerp)* (1916) 1 K. B. 346; *Mandrie Saccharine Co. v. Corn Products Co.* (1919) 1 K. B. 198; *Biddell Bros. v. E. Clemens Horst Co.* (1912) A. C. 18, affirming the dissenting judgment of Kennedy, L. J., in the Court of Appeal (1911) 1 K. B. 934; *Mohanlal Kashinath v. Krishna Premji & Co.* (1928) 30 Bom. L. R. 415, 109 I. C. 470, (1928) A. B. 170.

(r) In this connexion, the learned editors of the 13th edition of Scrutton on Charterparties, ask the question (p. 201): "In holding that the seller breaks his contract by failing to ship the goods [*Johnson v. Taylor Bros. & Co.*, *supra*, note (h)] did the House of Lords sufficiently distinguish between performance of the contract and the doing of something which is or may be a necessary step towards ability to perform the contract?" The actual decision in that case, namely, that the seller, if a foreigner resident out of the jurisdiction, cannot be sued in the English courts for breach of a c.i.f. contract when the goods were to be shipped in a foreign port and the documents tendered in England, if he has failed to ship the goods and consequently failed to tender the documents, does not affect India, and as

regards England has been rendered obsolete by a slight addition to R. S. C. O. XI, rule 1 (e). It is clear that where the buyer's claim is for non-delivery, the date at which the documents ought to have been tendered is the date for calculating the damages; *C. Sharpe & Co. v. Nosawa & Co.* (1917) 2 K. B. 814. Where however the goods have been shipped, and the buyer is suing for damages because they were not in accordance with the contract, the place of shipment is the place where the breach occurred; *Crozier & Co. v. Auerbach* (1908) 2 K. B. 161, C. A.

(s) *Duncan Fox & Co. v. Schrempff & Bonke* (1915) 3 K. B. 355, C. A.; *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (1916) 1 K. B. 495, C. A.; *Marshall & Co. v. Naginchand* (1916) 42 Bom. 473, 37 I. C. 644; contrast *Motishaw & Co. v. The Mercantile Bank of India* (1917) 41 Bom. 566, 37 I. C. 258, cf. *Pollock & Mulla*, pp. 313-316.

(t) *Finlay & Co. v. Kwik Hoo Tong* (1929) 1 K. B. 400, C. A.

(u) This was assumed to be the case in *Canada Atlantic Grain Export Co. v. Eilers* (1929) 35 Com. Cas. 90.

(v) *Biddell Bros. v. E. Clemens Horst Co.* (1911) 1 K. B., at p. 960.

is one to be performed by the delivery of documents representing the goods, i.e., of documents giving the right to have the goods delivered or the possible right, if they are lost or damaged, of recovering their value from the shipowner or from underwriters (w).

"It results from this that various rules in the Sale of Goods Act, which is primarily drafted in relation to the sale and delivery of goods on land, can only be applied to c.i.f. sales *mutatis mutandis*. And there may be cases in which the buyer must pay the full price for delivery of the documents, though he can get nothing out of them, and though in any intelligible sense no property in the goods can ever pass to him, i.e., if the goods have been lost by a peril excepted by the bill of lading and by a peril not insured by the policy, the bill of lading the policy yet being in the proper commercial form called for by the contract" (x).

The question therefore when exactly the property in the goods passes is (at any rate outside the law of Prize) somewhat academic and there is no positive decision on the point. It is clear that it does not pass until the documents have been taken up by the buyer (y) and the seller therefore can only claim damages for breach of contract and not the price if the buyer refuses to take them up (z). Again, if the provisions of section 25 of the Act are applicable, the property does not pass unless the conditions imposed by the seller on delivering the documents are fulfilled, and on the buyer's failure to perform the condition the seller is entitled to the return of the documents (a). But when the documents are duly accepted and the price duly paid by the buyer, it is open to question whether the property passes subject to its being re-vested in the seller, if it be discovered on examination of the goods after their arrival that they are not in conformity with the contract, and are thereupon rejected by the buyer, or whether it remains in the seller until the buyer has had an opportunity of examining the goods, and passes on his

(w) It therefore does not matter very much whether the contract is called a contract for the sale of documents relating to goods or a contract for the sale of goods to be performed by the delivery of documents.

(x) Scrutton on Charterparties, 8th edition, p. 167 (see 13th edition, pp. 200, 201) quoted with approval by McCordie, J., in *Manbre Saccharine Company v. Corn Products Co.* (1919) 1 K. B., at pp. 202-203.

(y) See *The Miramichi* (1915) p. 71.

(z) *Stein Forbes & Co. v. County Tailoring Co.*, 115 L. T. 215, see s. 65; *Mohantal Kashinath v. Krishna Premji*

& Co. (1928) 30 Bom. L. R. 415, 109 I. C. 470, ('28) A. B. 170; *Girdhari Lal v. Schales & Adams, Ltd.* ('37) A. L. 566. The dictum of Broadway, J., in *Bal Kishan-Basheswar Nath v. Fazal Elahi* (1927) 8 Lah. 173, 177, 102 I. C. 807, ('27) A. L. 391, that "taken as a broad proposition... in the case of c.i.f. contracts the property in the goods may be said to pass as soon as they are shipped" can scarcely be supported.

(a) *M. B. Mehta & Co. v. Joseph Heureux* (1924) 48 Bom. 531, 80 I. C. 766, ('24) A. B. 422; *Bank of Morvi, Ltd. v. Baerlein Bros.* (1923) 48 Bom. 374, 79 I. C. 1012, ('24) A. B. 325.

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accepting them (b). Since, however, the buyer has the right to examine and reject the goods, as in other cases, and may lose this right if he does any act in relation to the goods, as by re-selling them, which is inconsistent with the ownership of the seller, the question of the time when the property in the goods passes, after the documents are taken up and the price paid, is not of much practical importance.

F.o.b. contract.—This is a contract for the sale of goods to be delivered free on board a ship. The buyer therefore must name a ship upon which they are to be delivered and the seller must put them safely on board, pay the charge of doing so and for the buyer's protection give possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. There the contractual liability of the seller as seller ceases and the delivery to the buyer is complete as far as he is concerned (c). The goods are then at the risk of the buyer, he is responsible for the freight, and subject to the seller reserving the right of disposal, the property passes to the buyer (d): and even if, as sometimes happens, the goods are not specific or ascertained when put on board, as when they are part of a larger quantity, the price being payable against the bill of lading, they are still at the risk of the buyer and he has an insurable interest in them, and must pay the price on presentment of the bill of lading even if the goods have been lost (e).

The buyer is not entitled to demand delivery in any other manner than on board ship (f), and conversely if the buyer fails to name a ship, the seller's only remedy is to sue for damages for breach of contract; he cannot sue for the price (g). To put it in another way, the condition that the goods should be put on board is a condition which operates in favour of both parties and cannot be waived by either as if it were a condition inserted for his benefit only. If a port is named, the same rule applies (h).

(b) See *Hardy & Co. v. Hillerns & Fowler* (1923) 2 K. R. 490, C. A. set out post, p. 188. For a full discussion of the c.i.f. contract the reader is referred to the work of His Honour Judge A. R. Kennedy, K. C.

(c) *Wimble Sons & Co. v. Rosenberg & Sons* (1913) 3 K. B. 743, 756-757, per Hamilton, L. J.; *J. J. Cunningham, Ltd. v. Robert A. Munro & Co., Ltd.* (1922) 28 Com. Cas. 42, 45. The seller, therefore, is under no obligation to obtain a licence to export the goods if such a licence be necessary; *H. C. Brandt & Co. v. H. N. Morris & Co.* (1917) 2 K. B. 784, C. A.

(d) *Browne v. Hare* (1858) 3 H. & N. 484, 4 H. & N. 822, 117 R. R. 811, 118 R. R. 786, Ex. Ch.; *Alexander v. Gardner* (1835) 1 Bing. N. C. 671, 41 R. R.

651. In this case the price was to be paid by bill at two months from the landing of the goods, but this was held not to be a condition of payment but merely a provision fixing the time of payment, which therefore was two months after the goods ought in the ordinary course to have arrived; cf. *Fragano v. Long* (1825) 4 B. & C. 219, 28 R. R. 226.

(e) *Stock v. Inglis* (1889) 12 Q. B. D. 564, C. A. aff'd. 10 App. Cas. 263.

(f) *Wackerbarth v. Masson* (1812) 3 Camp. 270; *Maine Spinning Co. v. Sutchiffe & Co.* (1917) 23 Com. Cas. 216.

(g) *Colley v. Overseas Exporters* (1921) 3 K. B. 302. See note to s. 55.

(h) *Dayton Price & Co. v. Rohomotollah* (1925) 29 Cal. W. N. 422, 86 I. C. 571, ('25) A. C. 609.

Although the place for examination is usually the place of delivery, there is no rule that the goods must be examined on or before shipment, which may often be impracticable (i).

Sale ex ship.—The incident of a sale of goods ex ship was considered by Lord Sumner when delivering the judgment of the Judicial Committee of the Privy Council in a case which raised questions of insurance law (j).

The contract in that case was for the sale of "200 tons of Indian first class teak squares at Rs. 175 per ton ex ship. Shipment November-December at the rate of 100 tons monthly. Payment cash against documents." 144 logs out of a parcel of 382 shipped on board at Colombo constituted the first instalment of this contract, but after being discharged over the side of the ship, were lost in a gale. It was common ground that at that time they had been paid for and were the property of the buyers.

The sellers had insured the whole parcel of 382 pieces "as well in his or their own name as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all," and the policy covered "all risk of craft and/or raft from land to land." The buyer claimed the right to sue on this policy, and in holding that he had no such right the Court said (k):—

"Two suggestions were made in argument: one was that 'against documents' means in the language of commerce against a policy of insurance and sundry other documents; the other, that an obligation binding the sellers to insure on the buyer's behalf, might be inferred because the effect of the contract was to require payment not merely against goods delivered ex ship in a state corresponding to the contract description, but also against documents representing the goods, even though, through sea perils, they were no longer in a state corresponding to the contract description.

"The first point fails because there is no evidence to show that the word 'documents' in such a connexion includes a policy of insurance. A contract of sale, at a price c.f. and i., is so well understood that no proof is needed that one of the documents which it contemplates is a policy. It may be that, detached from any context, the mere expression 'shipping documents' would suggest that one of them is a policy. When, however, the expression is found in a contract, and there is nothing but the language of the contract to determine its meaning, it must be construed as meaning such documents as are appropriate to the

(i) See notes to s. 41. As to stoppage in transit see sections 50-52 and notes thereto.

(j) *Yangtze Insurance Association, Ltd. v. Lukmanjee* (1918) A. C. 585, P. C.

(k) *Ib.*, pp. 588-90.

contract. In the case of a sale 'ex ship,' the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein, which is usual for the delivery of goods of the kind in question. The seller has therefore to pay the freight, or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods. Till this is done he may have an insurable interest in profits, but none that can correctly be described as an interest 'upon goods,' nor any interest which the seller, as seller, is bound to insure for him. If the seller insures, he does so for his own purposes and of his own motion.

"Again, the mere documents do not take the place of the goods under such a contract. They are not the subject-matter of the sale. If an endorsed bill of lading is delivered to the buyer, it is given as a delivery order and not with any intention of making him a party liable upon it, or of vesting him with the property in the goods by the mere delivery of the document. As the goods are not at the buyer's risk during the voyage, there is nothing from which to infer an obligation on the seller, and therefore an intention on his part, to effect an insurance on the buyer's behalf.

"It was said that 'cash against documents,' first of all, implied some 'document other than a delivery order because of the use of the plural, and, secondly, must have reference to the risks of the voyage so as to make the contract analogous to a c.f. and i. sale, since if 'documents' only meant delivery of the goods' this would be implied by law. The answer seems to be, on the first point, that the plural 'documents' would be satisfied either by two delivery orders, one for each shipment, or by two documents, a delivery order and a receipt for the freight, in the case of each shipment. On the second point there is nothing surprising if such a contract is found to express something which the law would imply, and certainly there is nothing in it to compel a Court to give simple and well-known words a meaning which does not belong to them, and which does belong to other words or letters equally well-known though not so simple. In truth, however, 'cash against documents,' does carry the matter beyond 'cash on delivery,' that is, delivery of the goods, for it imports a convenient mercantile way of effecting the same object without the inconvenience of a payment at or contemporaneous with the discharge overside. It was admitted that payment could not be demanded, even 'against documents,' till the ship had arrived with the goods. The provision enables payment to be made in a counting-house and in the ordinary course of business, without reference to the precise stage which the process of tumbling the logs into the water may happen to have reached."

40. Where the seller of goods agrees to deliver them at his own risk at a place other than that

Risk where goods are delivered at a distant place.

where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

See
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Risk where delivery at a distant place.—There was nothing in the Indian Contract Act corresponding to this section, which is based on section 33 of the English Act. It was indeed suggested that the section should be omitted, as tending to confusion, and as inconsistent with the seller having undertaken to bear the risk ; but it was decided to retain it to bring the laws of the two countries into conformity.

The principle is based on a dictum by Alderson, B., in *Bull v. Robison* (l). "A manufacturer who contracts to deliver a manufactured article at a distant place must, indeed, stand the risk of any extraordinary or unusual deterioration ; but we think that the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from the one place to the other, or, in other words, that he is subject to and must bear the risk of the deterioration necessarily consequent upon the transmission."

This section applies the principle generally, and not only to the case of a manufacturer : it is however limited by the rule that perishable goods which are consigned to a distant place are not merchantable unless they are in a condition to remain saleable for a reasonable time (m).

In accordance with section 62, this section may be negatived not only by express agreement, but by usage or course of dealing between the parties.

Whether the phrase "at the seller's risk" applies to *all* risks or only to *unusual* risks, depends upon the facts of the particular case.

41. (1) Where goods are delivered to the buyer which he has not previously examined, he is not

Buyer's right of examining the goods.

deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to

(l) (1854) 10 Ex. 342, at p. 346, 102 R. R. 620.

(m) *Beer v. Walker* (1877) 46 L. J. C. P.

677, 37 L. T. 278 ; cf. *Ollett v. Jordan* (1918) 2 K. B. 41, at p. 47.

afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of boots for use of the French Army. Delivery under the contract was made to the buyers at a wharf in London and the boots were sent on by them to Lille there to be delivered to the French authorities. The boots contained paper in the soles, a defect which rendered them useless for military purposes but could not be disclosed by any examination which was practicable at the wharf in London. When the French authorities examined the samples at Lille, they discovered that in many cases they contained paper and the French authorities accordingly rejected all the boots. It was held that the buyers had not accepted the boots and were entitled to recover the money which they had paid for them (*n*).

(2) Sale of goods at an auction. The goods were open to inspection for two days before the sale and by the printed conditions of the sale the buyer was to pay a deposit and remove the goods with all faults, imperfections or errors by a specified date and to pay the balance of the purchase price before taking them away. It was held that the buyer was not entitled to examine the goods before paying the balance of the price (*o*).

(3) Agreement between the plaintiff, who held certain goods of the defendant by virtue of a lien, and the defendant, that the defendant should pay off the amount due to the plaintiff on receiving the goods. The plaintiff tendered to the defendant closed cases which he alleged contained the goods but refused to allow the defendant to open the cases. This was held not to be a valid tender of the goods (*p*).

(4) Sale of goods *c.i.f.* cash against documents. The buyer on taking up the documents does not accept the goods and may reject them if it is found on their arrival that they are not in accordance with the contract (*q*).

Buyer's right to examine the goods.—The effect of sub-section (1) is that, in cases where there has been no previous examination of the goods, “the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them

(*n*) *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438.

(*o*) *Pettitt v. Mitchell* (1842) 4 Man. & G. 819.

(*p*) *Isherwood v. Whitmore* (1843) 11

M. & W. 347, 63 R. R. 624.

(*q*) *Biddell Bros. v. E. Clemens Horst & Co.* (1911) 1 K. B., at p. 960; Kennedy, L. J., affirmed (1912) A. C. 18.

to see whether they are or are not in accordance with the contract" (r); for "no acceptance can properly be said to take place before the purchaser has had an opportunity of rejection" and "a right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance so as irrevocably to vest the property in the buyer can take place before he has exercised or waived that right" (s).

It follows from this that the seller cannot, in the absence of agreement to the contrary (t), claim that his tender of delivery is a performance of the contract on his part so as to enable him to sue the buyer for the price or for damages for non-acceptance, if he has not made it in such circumstances that the buyer has had a reasonable opportunity of examining the goods in order to ascertain whether the thing tendered really was what it purported to be (u). This is but an instance of the general rule laid down by section 38 of the Indian Contract Act, and sub-section (2) is only another way of expressing it.

Reasonable opportunity of examining is all that the Act requires; it is the buyer's business to verify not the seller's to supply further proof that the goods are according to contract. The goods need not be in the seller's actual possession; control is enough (v).

It will be remembered that under section 17 (2), where goods are sold by sample, it is a condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and if it is not given him, he may rescind the contract.

The rule declared by sub-section (2) is excluded in the case of a c.i.f. contract, the obligation of the seller being to tender the documents within a reasonable time, and he need not wait till the goods have arrived before calling on the buyer to take up the documents. This however, as has been seen, will not prejudice the buyer's right subsequently to examine the goods on their arrival and reject them if not in conformity with the contract (w).

(r) *Hardy & Co. v. Hillerns & Fowler* (1923) 1 K. B. 658, at p. 663, per Greer, J., affirmed (1923) 2 K. B. 490, at p. 495. Note that the words of the section are "has not previously examined" not "has not had an opportunity of previously examining." The common law perhaps was less favourable to the buyer. See per Parke, B., *Isherwood v. Whitmore*, *supra*, at p. 349.

(s) *Bog Lead Mining Co. v. Montague* (1861) 10 C. B. N. S. 481, at p. 489, 128 R. R. 797. As to waiver see next section.

(t) For an instance of this see *Pettitt v. Mitchell*, *supra*.

(u) *Isherwood v. Whitmore*, *supra*,

example (3); *Startup v. Macdonald* (1843) 6 Man. & G. 593, at p. 610, 64 R. R. 810 (question of the reasonableness of the hour of delivery).

(v) *Pollock and Mulla*, p. 257, citing *Arunachallam Chettiar v. Krishna Ayyar* (1925) 49 Mad. L. J. 530, 90 I. C. 481, ('25) A. M. 1168 for the last proposition. As to reasonable opportunity see *Ruttonsey v. Jamnadas* (1882) 6 Bom. 692, set out at length *op. cit.*, pp. 256-257.

(w) *E. Clemens Horst v. Biddell Brothers* (1912) A. C. 18; *Hardy & Co. v. Hillerns & Fowler* (1923) 2 K. B. 490, C. A.; cf. *Polenghi Brothers v. Dried Milk Co.* (1904) 92 L. T. 64.

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Time and place of examination.—*Prima facie* the time and place of examination are the time and place of delivery (x); but it may be that owing to special circumstances, this is not practicable, and they can only reasonably be examined at the place of their final destination, a position which frequently occurs in a contract of sale of goods f.o.b. (y) and may occur even when the goods are delivered to the buyer and sent on by him to his consignees (z). The parties also may make such terms as they please as to the place and method of the examination.

42. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Acceptance.

Examples.—The section may be illustrated by the following examples :—

(1) Sale of wheat c.i.f. The ship arrived on March 20th and the buyers took up the documents on that day. On the next the discharge of the cargo began, the buyers took delivery and on the same day resold and dispatched part of the wheat to sub-buyers. On March 23rd, having discovered that the wheat was not in accordance with the contract, the buyers gave notice to the sellers that they rejected it and this notice was given within a reasonable time. The buyers, however, were held to have accepted the wheat and therefore the notice of rejection was ineffectual (a).

(x) *Perkins v. Bell* (1893) 1 Q. B. 193, C. A.; *Nagardas v. Velmahomed* (1930) 32 Bom. L. R. 454, 126 I. C. 312, ('30) A. B. 249; *In re Andrew Yule & Co.* (1932) 59 Cal. 928, 140 I. C. 877, ('32) A. C. 879.

(y) *Boks v. Rayner & Co.* (1921) 37 T. L. R. 519, affirmed *ib.* 800, C. A.; *Scaliaris v. Ofverberg & Co.* (1921) 37 T. L. R. 307, C. A.; *Bragg v. Villanova* (1923) 40 T. L. R. 154.

(z) *Heilbutt v. Hickson*, *supra*, example (1). (In this case suspicions arose that the boots might contain paper in the soles and it was thereupon expressly agreed by the defendants that if this were so they would take the boots back. The majority of the Court relied upon the express agreement of the defendants to take back the boots, but Brett, J., thought that apart from it the plaintiffs could reject, as the examination at the wharf could not be effectual to disclose that defect, which was only discoverable

on fuller examination at Lille); cf. *Van den Hurk v. R. Martens & Co.* (1920) 1 K. B. 850, where the question was the date to be taken for the purpose of assessing the damages. Bailhache, J., who decided the case, had to explain shortly afterwards that he did not intend to lay down any rule except for facts of that peculiar nature, namely that the place of delivery by the original vendor, not being, as was known, the place of the ultimate destination of the goods, is in itself unsuitable or for some other special reason inspection is not convenient there: *Saunt v. Belcher & Gibbons* (1920) 90 L. J. K. B. 541, cf. remarks of Greer, J., in *Hardy & Co. v. Hillerns* (1923) 1 K. B., at p. 665.

(a) *Hardy & Co. v. Hillerns & Fowler* (1923) 2 K. B. 490, C. A. cf. *In re Andrew Yule & Co.* (1932) 59 Cal. 928, 140 I. C. 877, ('32) A. C. 879; *Mithan Lal-Inder Narain v. Suraj Parshad-Madan Gopal* (1932) 135 I. C. 498, ('32) A. L. 52.

(2) Sale of a quantity of coal briquettes of a specified size. They were loaded partly on deck and partly under deck, those on deck being of the contract size. The master of the ship finding that the cargo was heating bought the deck cargo from the buyers. It was afterwards discovered that the briquettes loaded under deck were of a size larger than the specified size. The buyers thereupon gave notice rejecting the whole cargo and not (as they might have done) the under deck part only. As they had accepted part of the cargo this notice was ineffectual (b).

(3) Sale of kitchen fitments. They were delivered to an employee of the buyer and remained on his premises for upwards of three weeks. The buyer himself did not act in relation to the goods. The buyer was held to have accepted the goods (c).

Acceptance.—Many of the English decisions dealing with the question of acceptance are decisions on the Statute of Frauds. At one time it seems to have been the view that “acceptance” which satisfied the Statute meant, as it means in the Act, the ultimate acceptance of the goods as satisfying the contract (d), but later a different view prevailed and under the present law there may be an acceptance within the meaning of the Statute though the buyer is still at liberty to reject the goods; indeed rejection itself may amount to such acceptance, for all that is required is such a dealing with the goods as amounts to a recognition of the contract (e). The later cases, therefore, which decide that there has been an acceptance sufficient to satisfy the Statute are no authority for the proposition that there has been an acceptance so as to oblige the buyer to pay for the goods, which is the meaning of the term in this section.

It appears from the section that the buyer may accept the goods even before they are delivered, by intimating to the seller that he accepts them, as he may do by actually selecting the goods, or directing delivery to be made to third parties (f). Merely taking delivery does not, as has been seen, amount to acceptance (unless it be taken in such circumstances as to show that the buyer waived his right of examination), and this is particularly the case where delivery is made to a carrier. If, however, after

(b) *Barker (Junior) & Co. v. Agius Ltd.* (1928) 43 T. L. R. 751.

(c) *In re A Debtor* (1939) 1 Ch. 225.

(d) Blackburn on sale, pp. 16, 17; *Kent v. Huskinson* (1802) 3 B. & P. 233, 6 R. R. 777; *Norman v. Phillip* (1845) 14 M. & W. 277; *Hunt v. Hecht* (1853) 8 Ex. 814, 91 R. R. 780, disputing the newer doctrine introduced by *Morton v. Tibbett*, *infra*.

(e) *Morton v. Tibbett* (1850) 15 Q. B. 428, 81 R. R. 666; *Kibble v. Gough* (1878)

38 L. T. 204, C. A.; *Page v. Morgan* (1886) 15 Q. B. D. 228, C. A.; *Abbott v. Wolsey* (1895) 2 Q. B. 97, C. A.; *Taylor v. G. E. Rly.* (1901) 1 K. B. 774.

(f) *Cusack v. Robinson* (1861) 1 B. & S. 299, 124 R. R. 566 (a case on the Statute of Frauds, but it would appear that the decision would apply to acceptance under this section); *Haridas v. Kalumull* (1903) 30 Cal. 649; cf. *Parker v. Palmer* (1821) 4 B. & Ald. 387, 23 R. R. 313 (seller putting up goods at an auction sale at the request of the buyer).

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delivery the buyer deals with the goods in a manner inconsistent with the ownership of the seller, he thereby accepts them, nor does it signify that he so deals with them before the time which he has for examining them has elapsed. The corresponding section of the English Act (s. 35) was fully discussed in the case of *Hardy & Co. v. Hillerns & Fowler (g)*, and in the course of his judgment Atkin, L. J., said: "One of the acts upon the doing of which the buyer is deemed to have accepted the goods is that he intimates to the seller that he has accepted them. I think it is plain that such an intimation may be made before he has had a reasonable opportunity of examination, and if such an intimation is made then it appears to me that without more the section operates and he is to be deemed to have accepted them. In the same way, when he does an act in relation to the goods which is inconsistent with the ownership of the seller, the section must be treated as coming into operation notwithstanding that the reasonable opportunity of examining them has not expired; as for instance where a man having had goods delivered to him turns them, or part of them, at once into his mill and uses them in the manufacture. In the present case the Tribunal of Appeal have found that the buyer had not had a reasonable opportunity of examination until March 23rd, a date which is subsequent to the act relied on by the sellers as being inconsistent with their ownership; but that finding is, in my opinion, immaterial.

"Therefore we have here to face the problem whether the act of the buyers in reselling and dispatching the goods was inconsistent with the ownership of the sellers. If it was, they must be deemed to have accepted them. I should like to point out, in reference to that provision, that all the words of the section must have effect given to them. The words are "When the goods have been delivered to him"—that is to the buyer—"and he does any act" of the kind specified. That means that the buyer must have got delivery before he does the act (*h*). Here the arbitrators have found the buyers did obtain delivery of 1,877 qrs. on March 21st, and that it was out of the wheat so delivered to them that they, on the same day, forwarded the various parcels to their sub-purchasers. It was, however, said on behalf of the buyers that before they did so the property in the cargo had already passed to them, and that therefore the sub-sales by them could not be inconsistent with the ownership of the sellers. What is the precise position with regard to the passing of the property under a c.i.f. contract it is perhaps not necessary here to determine. My own view is that, if the goods are not in

(g) *Supra*, example (1), at p. 498; *Eand S. Ruben v. Faire Bros & Co.*, (1949) 1 All. E. R. 215.

(h) Hence the mere fact that the buyer has re-sold the goods before they were delivered to him is not in itself conclusive

evidence of acceptance: *J. & J. Cunningham, Ltd. v. Robert A. Munro & Co.* (1922) 28 Com. Cas. 42; cf. *Morton v. Tibbett, supra*, note (y), at p. 439, but that case turned upon the meaning of "acceptance" in the Statute of Frauds.

accordance with the contract, the property does not pass to the purchaser upon his taking up the documents, if he has not had at that time an opportunity of ascertaining whether the goods are in conformity with the contract. Though it may be that the property passes subject to its being revested when the buyer exercises his right of rejection. But it does not seem to me to matter much for the purposes of this case which of those two views is correct. In either view what happened here was enough to take away the buyer's right of rejection. If the possession was transferred by the buyers to third persons in circumstances which were inconsistent either with the goods being the property of the sellers at the time of such transfer, or inconsistent with their being restored to the sellers upon the notice of rejection being given, it appears to me that the transfer was an act which was inconsistent with the ownership of the sellers; and under those circumstances I think that it is quite immaterial that the sub-purchasers may afterwards, by agreement or otherwise (i), have returned the goods to the buyers. Such return cannot avail to restore a right of rejection which has been lost. That being so I think that the buyers must be content with their claim in damages."

Time for rejection.—The parties may by the contract limit the time within which the buyer must determine whether to accept or reject the goods and if after the expiration of such a limit, or if no time be fixed, a reasonable time, he does not reject, he is deemed to have accepted them. As in all other cases what is a reasonable time is a question of fact (j). The notice of rejection, moreover, must be a valid notice to make it effectual (k).

If the contract is not severable, the buyer cannot, except in cases provided for by section 37, reject part of the goods: if therefore he accepts part, he accepts all (l).

Although by accepting the buyer loses his right to reject, he may still claim damages for any breach of condition (m).

(i) See *Benaim & Co. v. L. S. Debono* (1924) A. C. 514, P. C. (sub-buyers rejecting the goods).

(j) See *Fisher Reeves & Co. v. Armour & Co.* (1920) 3 K. B. 614, at p. 624, per Scrutton, L. J.; *Kissendoyal v. Askaran* (1916) 23 Cal. L. J. 415, at p. 422, 34 I. C. 290; *Ishar Das-Dharam Chand v. Khanu Mal-Ghammandi Lal* (1927) 8 Lah. 276, 100 I. C. 548, ('27) A. L. 443; *Empire Engineering Co. v. Municipal Board, Bareilly*, (1929) 27 All. L. J. 674, 119 I. C. 853, ('29) A. A. 801; *Province of*

Madras v. Garlia Kotwala & Co., Ltd. (1946) Mad. 548, (1946) A. M. 69.

(k) *Barker (Junior) & Co. v. Agius Ltd.*, *supra*, example (2).

(l) *Hardy & Co. v. Hillerns & Fowler* (1923) 1 K. B., at p. 666, per Greer, J. *In re Andrew Yule & Co.* (1932) 59 Cal. 928, 140 I. C. 877, ('32) A. C. 879; *Pranlal Bhaichand v. Maneckji Petit Manufacturing Co.* (1932) 34 Bom. L. R. 1252, 140 I. C. 610, ('33) A. B. 46 and cf. s. 13 (2).

(m) See s. 13.

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43. Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

Buyer not bound to return rejected goods.

Position of parties when goods are rejected.—It was well established at common law that when a buyer properly rejects the goods, it is not his duty to send them back to the seller: it is enough for him to give clear notice that they are not accepted, and then they are at the seller's risk (n). He is not bound to put himself to the expense and trouble of returning the goods, and it is the seller's business to take away the goods if he is so minded (o), and if the buyer offers to return them, and the seller refuses to take them, the buyer, it seems, may charge for their keep (p). The goods, however, must be put at the disposal of the seller; the buyer for instance cannot claim to keep them as security for the price which he may have paid in advance. The buyer in such a case is not in a position analogous to that of an unpaid seller within the meaning of section 45 (2) (q).

Sections 41 to 43 are somewhat closely connected, and the rule enunciated in this section must always be kept in mind when the question arises as to the proper place of examination, or whether the buyer has done anything inconsistent with the ownership of the seller (r).

44. When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:

Liability of buyer for neglecting or refusing delivery of goods.

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the

(n) *Grimoldby v. Wells* (1875) L. R. 10 C. P. 391 (treated as not really arguable); *Sumer Chand v. Ardeshir* (1907) All. W. N. 67.

(o) *Phaggu Mal v. Babu Lal* (1913) 35 All. 325, 19 I. C. 254; *Buch v. Gordhandas* (1922) 24 Bom. L. R. 991, 70 I. C. 877, ('23) A. B. 92.

(p) *Caswell v. Coare* (1809) 1 Taunt.

566, 10 R. R. 606; *Chesterman v. Lamb* (1834) 2 A. & E. 129, 41 R. R. 397.

(q) *J. L. Lyons & Co. v. May & Baker, Ltd.* (1923) 1 K. B. 685.

(r) See *Hardy & Co. v. Hillerns & Fowler* (1923) 2 K. B. 490, C. A. and the judgment of Atkin, L. J., set out in the notes to the previous section, *ante* p. 188.

buyer to take delivery amounts to a repudiation of the contract.

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Rights of seller when buyer neglects to take delivery.—"If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room ; or he may bring an action for not removing them, should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract " (s). This ruling by Lord Ellenborough is embodied in the section. That the rule may apply, it is necessary that the property should have passed, and the seller should claim no lien ; and the seller's request must be for the buyer not to accept, but to take delivery. Mere delay by the buyer in taking delivery does not entitle the seller to rescind the contract, unless indeed the date at which he is to do so is of the essence of the contract. In the case of undue delay, however, the seller may give notice fixing a reasonable time, after the expiration of which he will treat the contract as at an end. These rights are preserved by the proviso to the section (t).

(s) *Greaves v. Ashlin* (1813) 3 Camp. 426, 14 R. R. 471.

(t) Compare s. 55 of the Indian Contract Act and see Pollock and Mulla, pp. 301-305.

CHAPTER V.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

S. 45

45. (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

"Unpaid seller" defined.

- (a) when the whole of the price has not been paid or tendered ;
- (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Examples.—The section may be illustrated by the following examples :—

(1) The seller draws bills for the price of the goods on the buyer, who accepts them, and the seller negotiates them. Before the bills arrive at maturity the buyer fails. The seller has thereupon all the rights of an unpaid seller (*u*).

(2) *A* consigned a cargo to *Z* in London exceeding the quantity which *Z* had contracted to take and drew two bills on *Z*, one for the price of the quantity contracted for, the other for the price of the residue. *Z* accepted the first bill and refused to accept the second. It was then agreed that *B*, who was *A*'s London agent, should himself take the smaller portion. This agreement, as the Court held, gave the right to *Z* to take possession of and receive his portion of the goods on the ship's arrival and *B* the right to receive the residue. *B* sold his interest in the cargo to *P*, taking *P*'s bill. There was only one bill of lading which was held by *Z*, and *P* had only a delivery order addressed to the master of the ship. *P* pledged his interest in the cargo to *Q* and handed *Q* this delivery order. Before the ship arrived *P* failed and the bill which he had given to *B* was dishonoured. *B* notified the master not to deliver his share of the cargo to anyone without further instructions. Held that *B* was

(*u*) *Feise v. Wray* (1802) 3 East. 93, 6 R. R. 551.

in the position of an unpaid seller, was entitled to stop his portion of the cargo in transit and had effectually done so as against Q (v).

Unpaid seller.—This chapter of the Act deals with the rights of an unpaid seller against the goods after they have become the property of the buyer, and in this, the introductory, section gives a definition of the term “unpaid seller,” which was not done by the Indian Contract Act.

At one time there was a question whether a seller who had been partially paid was entitled to the rights of an unpaid seller, but that question was set at rest many years ago (w), and it has long been firmly established that the seller who is partially unpaid is in the same position as the seller who is wholly unpaid. A seller, however, is not unpaid if the buyer has tendered the price and the seller has refused to accept it; in such a case the seller loses all his rights against the goods.

Moreover, the seller is unpaid not only when the price has not in any way been paid or tendered in full, but also if he has taken bills of exchange or other negotiable instruments as conditional payment and the buyer has failed to meet them at maturity or has become insolvent during their currency (x), “and that too though the seller may have negotiated the bills, and they are still outstanding and not yet at maturity” (y); “and this is very reasonable, for it is quite certain that the insolvent will dishonour his acceptances, and all but certain that the holders will fall back on the drawer for payment” (z). The law was thus stated by Mellish, L. J.: “No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill and, during the time that the bill is current, there is no vendor’s lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor’s lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser” (a).

Payment by bill is presumably conditional payment.—Where payment by acceptance of bills or the like is stipulated for, it is presumed

(v) *Jenkyns v. Usborne* (1844) 7 Man. & G. 678, 66 R. R. 767.

(w) *Hodgson v. Loy* (1797) 7 T. R. 440, 4 R. R. 483.

(x) *Edwards v. Brewer* (1837) 2 M. & W. 375, 46 R. R. 626.

(y) See *Feise v. Wray*, *supra*, example (1); *Gunn v. Bolckow Vaughan* (1875) L. R. 10 Ch. App. 491.

(z) *Blackburn on Sale*, pp. 327-8.

(a) *Gunn v. Bolckow Vaughan*, *supra*, at p. 501, where the principal rule is declared settled law. *Bunney v. Poyntz* (1833) 4 B. & Ad. 568, 38 R. R. 309, can be supported only as applicable to the case of a negotiable instrument treated as payment in full. See *Re J. Defries & Son* (1909) 2 Ch. 423.

S. 45 to be conditional on the bills being met, but this general rule may be excluded if the intention of the parties is to treat it as a final discharge of the debt leaving the creditor to his remedies on the bill. A seller who has thus taken a negotiable security as an absolute payment is no longer an unpaid seller, and therefore has no rights against the goods (b). It is a question of fact whether the parties intended the taking of the negotiable instrument to operate as an absolute payment (c), but the presumption is against it.

Title to seller's rights.—Sub-section (2) is of wide application and the examples given in that section of people who are included in the term “seller” are based upon old authority (d); and there is undisputed authority for extending it, in some circumstances, to a seller who has never had possession of or the right to possess any ascertained goods, but has only acquired the right to take a certain proportion of an entire bulk. The case which laid this down (e) was decided by a strong Court and appears to be very good authority. Sir M. Chalmers cites it with the observation that the Courts show a strong inclination to give the rights of an unpaid seller against the goods to anyone whose position can be shown to be substantially analogous to that of an ordinary seller (f). This Act, like the English Act, has no words excluding persons in such a position from the like rights with those expressly affirmed to the unpaid seller, and there does not therefore seem to be anything to prevent the Courts from continuing to follow the same course in either country.

. In the case of a surety for the buyer who has paid the seller, his right to stand in the seller's place appears to be included in “all the rights which the creditor had against the principal debtor,” to which he is expressly entitled under section 140 of the Indian Contract Act. The corresponding rule is now settled in England (g).

(b) *Cowasjee v. Thompson* (1845) 3 M. I. A. 422, 5 Moore P. C. 165, 70 R. R. 27 (option to pay in cash or bills).

(c) *Goldshede v. Cottrell* (1836) 2 M. & W. 20.

(d) *Morison v. Gray* (1824) 2 Bing. 260, 27 R. R. 624 (transfer of bill of lading to agent); *Feise v. Wray*, *supra*, example (1); *The Tigris* (1863) Br. & L. 38, 32 L. J. Adm. 97 (merchant who had bought on his own credit for another to whom he endorses the bill of lading); cf. *Ramendra Nath Roy v. Brajendra Nath Dass* (1919) 46 Cal. 831, 53 I. C. 986 (broker liable on principal contract); *Harilal Chimanlal v. Pehladrail & Co.* (1929) 31 Bom. L. R. 508, 120 I. C. 337,

(‘29) A. B. 260 (commission agent liable personally for price). This does not make the relation of the parties equivalent to that of buyer and seller for other purposes; *Cassaboglou v. Gibb* (1883) 11 Q. B. D. 797, 806, per Fry, L. J.; *Venkatachalam Chettiar v. Ponnuswami Aiyangar* (1924) 47 Mad. L. J. 312, 82 I. C. 536, (‘25) A. M. 46.

(e) *Jenkyns v. Usborne*, *supra*, example (2). Judgment of the Court of Common Pleas, per Tindal, C. J.

(f) Chalmers, p. 102.

(g) *Imperial Bank v. London & St. Catherine Docks Co., Ltd.* (1877) 5 Ch. D. 195.

Seller in possession as bailee of the buyer.—At common law it was held that by ceasing to possess in his original character, and agreeing to possess on the buyer's account, the seller abandoned his lien; and for this reason, such an attornment was held to constitute a "receipt" of the goods by the buyer within the meaning of the Statute of Frauds (*w*). But if the buyer became insolvent, the right of lien was held to revive (*x*).

See
47, 48

In *Grice v. Richardson* (*y*) the appellants, who traded in Australia, imported three parcels of tea which they sold to the respondents, who gave their acceptance or promissory notes for the price. The appellants were also warehousemen, having a bonded warehouse in which they had stored the tea on its importation. On selling the tea to the respondents, the appellants handed them delivery orders, each of which stated that the tea to which it referred was warehoused by the appellants. The delivery orders were subsequently endorsed by the respondents to W. & Co., and entries were made at the warehouse that the tea had been transferred to W. & Co. Subsequently W. & Co. became insolvent and their acceptances and notes were dishonoured, by which time part of the tea had been delivered to W. & Co. and part remained in the warehouse, for which the appellants had not been paid. *Held*, that the appellants as vendors retained their lien in respect of the tea which remained in the warehouse.

Common law rule altered by the Act.—The English Act, section 41 (2), however, affirmed the seller's right of lien notwithstanding that he is in possession as agent or bailee of the buyer, and this sub-section reproduces that provision. The earlier English decisions on the case of default without insolvency are therefore now inapplicable in both countries.

The interesting question whether such an arrangement between the seller and buyer will now constitute a "receipt" sufficient to satisfy the Statute of Frauds need not be debated in India: but perhaps the provision of this sub-section will not be entirely irrelevant if in any case the question should arise whether the seller is in possession within the meaning of section 30 (1).

48. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

Part delivery.

(*w*) *Cusack v. Robinson* (1861) 1, B. & S. 299, 124 R. R. 566. Judgment of the Court delivered by Blackburn, J.

(*x*) *Townley v. Crump* (1835) 4 A. & E. 58, 43 R. R. 300, where it is treated

as already clear that a vendor who is himself the warehouseman, does not lose his rights against a buyer who afterwards became bankrupt, merely by giving him a delivery order.

(*y*) (1877) 3 App. Cas. 319, P. C.

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Lien available though seller has parted with possession of part of the goods.—This section is very similar to section 34 and the principles enunciated in the cases cited under that section equally apply to this and it is therefore sufficient to refer to them (z).

The section recognizes the rule that the seller's lien is available so long as he holds any part of the goods, and no case appears to have arisen in which part delivery has been held to be delivery of the remainder, so as to divest the seller's lien, when the goods were actually in the seller's own custody. A somewhat desperate attempt was once made to persuade the Court that a sub-sale by the buyer of part of the goods, which remained in the seller's warehouse, and delivery thereof at the buyer's request to the sub-buyer operated as a constructive delivery of the whole to the buyer (a), but even then the sub-sale and delivery under it were relied on rather "upon the ground that the vendee treated the goods as his own" (b) with the consent of the seller than because of any supposed intrinsic value of part delivery. The Court did not think it necessary to hear the seller's counsel on either branch of the argument. Whichever way it was considered, the dealing with part could not be presumed to have any reference to the whole, nor could the seller be presumed to intend to abandon any right as to the residue. There was also a question of the effect of paying warehouse rent, but as already seen, the payment of such of rent is not conclusive to show that the seller holds the goods as the buyer's bailee (c), and that point also was decided in the seller's favour.

Instalment deliveries.—Even where the contract is for delivery and payment by distinct instalments and the buyer becomes insolvent (d) in the course of performance of the contract, the seller need not deliver any more goods without payment in full. He is entitled to refuse to deliver any more till he is paid the debt due to him for those already delivered as well as the price of those still to be delivered (e). But the trustee in

(z) See the examples and notes to that section, pp. 154-156 *ante*.

(a) *Miles v. Gorton* (1834) 2 Cr. & M. 504, 39 R. R. 820.

(b) *Follett arguendo*, 2 Cr. & M., p. 507.

(c) See the note to s. 33, *ante* pp. 184, 185. In those days an agreement by the seller to hold the goods as the buyer's bailee operated as a delivery which terminated the seller's lien, but this is no longer the law. See s. 47 (2) and the note thereto *ante* p. 197.

(d) *Aliter*, apparently, if the buyer remains solvent; non-payment of one instalment will not, it seems, in that case entitle the seller to claim a lien on the

next instalment for the price of the unpaid instalment and withhold delivery of it on that ground. See *Chalmers*, p. 106, and cf. *Soottan Chund v. Schiller* (1878) 4 Cal. 252. As to failure to pay for the instalment amounting to a repudiation by the buyer of the contract so as to entitle the seller to rescind and on that ground refuse delivery of any further instalment, see s. 38.

(e) *Ex parte Chalmers* (1873) L. R. 8 Ch. App. 289, 293. See p. 195 *ante*. The seller, however, must deliver an instalment which has been paid for. *Merchant Banking Co. v. Phoenix Bessemer Co.* (1877) 5 Ch. Div. 205.

bankruptcy of a bankrupt purchaser, and it seems also a sub-purchaser, may elect to fulfil the contract by tendering the price in full within a reasonable time, although the seller is not bound to tender the goods (*f*).

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48, 49

When goods in the custody of a bailee.—When the goods are in the custody of some bailee of the seller's it is less difficult to show that delivery of part by the bailee to the buyer operates as the delivery of the whole, but even in those cases it often appears that the bailee had, with the consent of the seller, attorned to the buyer in respect of the whole (*g*), and where this is not the case it must still be shown that the part delivery took place in such circumstances as to make it a delivery of the whole (*h*).

Acceptance of part of the goods under the Statute of Frauds.—

It may perhaps be worth while to observe that a decision under the Statute of Frauds in England, that an acceptance of part of goods ordered, where the contract included several classes of goods, made the contract enforceable as to all the goods contracted for, and not only as regards the parts to which the parcel accepted belonged (*i*), has nothing to do with the effect of part delivery as regards the seller's lien or right to stop in transit either at common law or under the present Act. It certainly does not decide that the fact of a cargo sold at one time containing goods of several kinds might not strengthen the presumption against the delivery of half the cargo, consisting of goods of one kind only, being intended to operate as a delivery of the whole.

Termination of **49. (1) The unpaid seller of goods**
lien. loses his lien thereon—

- (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;
- (b) when the buyer or his agent lawfully obtains possession of the goods ;
- (c) by waiver thereof.

(*f*) *Ex parte Stapleton* (1879) 10 Ch. Div. 586 ; *Grey v. Lamond Walker* (1913) 40 Cal. 523, 531-533, 18 I. C. 753, and see *Kemp v. Falk* (1882) 7 App. Cas. at p. 578, where Lord Selborne expressed the opinion that a sub-purchaser would have this right.

(*g*) See for instance *Hammond v. Anderson* (1803) 1 B. & P. N. R. 69, 8 R. R. 763, in which case the buyer had,

in addition, weighed and, therefore, had had actual physical possession of the whole, cf. *Slubey v. Heyward* (1759) 2 Hy. Bl. 504, 3 R. R. 486 (a case of stoppage in transit).

(*h*) See for instance *Tanner v. Scovell* (1845) 14 M. & W. 28, 69 R. R. 644, which should be contrasted with *Hammond v. Anderson*, *supra*.

(*i*) *Elliott v. Thomas* (1838) 3 M. & W. 170, 49 R. R. 558.

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(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

Examples.—The section may be illustrated by the following examples:

(1) Goods were sold and sent by the sellers at the request of the buyer to shipping agents of the buyer, and were put on board a ship by those agents. Subsequently they were re-landed and sent back to the sellers for the purpose of re-packing. While they were still in the possession of the sellers for that purpose, the buyer became insolvent. Thereupon the sellers refused to deliver them to the buyer's trustee in bankruptcy except upon payment of the price. *Held*, that the sellers had lost their lien by delivering the goods to the shipping agents, and their refusal to deliver the goods to the trustee was wrongful (*j*).

(2) Sale of a stack of hay for £86, to be paid for as taken away, the whole to be removed by a certain date. Part, but only part, was paid for and removed by the buyer before that date, and two months after that date the seller cut up and used the remainder. By so doing the seller waived his lien, and the buyer successfully maintained an action of trover against him (*k*).

Loss of lien.—The seller's lien depends upon possession: hence “when the vendor has given the buyer possession under the contract of sale, all his rights in the goods are completely gone; he must recover the price exactly as he would recover any other debt (*l*), and has no longer any claims on the goods sold superior to those of any other creditor. The delivery and acceptance of possession complete the sale, and give the buyer the absolute unqualified and indefeasible rights of property and possession in the things sold, though the price be unpaid and the buyer insolvent, unless, indeed, the whole transaction is vitiated by actual fraud” (*m*). The various methods by which possession can be given to the buyer have already been discussed (*n*), and sub-section (1) (*b*) merely summarizes the results, while the provision of sub-section (1) (*a*) follows logically from section 39 (1). The reservation of the right of disposal, indeed, prevents the delivery to the carrier being a delivery to the buyer, but as in such cases the property remains in the seller (*o*), no question of his parting with his lien really arises,

(*j*) *Valpy v. Gibson* (1847) 4 C. B. 837, 72 R. R. 740.

(*k*) *Gurr v. Cuthbert* (1843) 12 L. J. Ex. 309, 61 R. R. 787.

(*l*) Cf. *Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co.* (1926) 50 Bom. 360, 53 I. A. 92, 94 I. C. 824, ('26) A. P.C. 38 (sale of shares).

(*m*) Blackburn on Sale, p. 313. The ancient law of some continental countries

was more favourable to the seller, and allowed him to recover the goods if they still existed in specie in the hands of an insolvent buyer, or even in the hands of a *bona fide* sub-purchaser if no general credit had been given. This, however, is now of little but historical interest. See *op. cit.* pp. 314-15.

(*n*) See notes to s. 33.

(*o*) See section 25 (1).

for the right of lien only comes into existence when the property has passed. But when the property has passed, and the seller, though entitled to retain possession, deliberately parts with the possession by delivering the goods under the contract, he abandons his rights over the goods, subject to the one exception, that if they are delivered to a carrier for transmission to the buyer, he still has the right on the buyer's insolvency to stop the goods in transit and so resume possession (*p*). Where machinery has been delivered and thereafter a part of the machinery is handed over to the vendor for repair, the vendor cannot claim a lien on such part of machinery for the unpaid price of the machinery (*q*).

Buyer tortiously obtaining possession.—If the buyer by some tortious act obtains possession of the goods, the seller may take them back, if he can do so (*r*), or sue the buyer in trover if he refuses to re-deliver them, for the mere right to have possession of the goods is a sufficient right upon which to found that action (*s*). The same result would no doubt follow if, say, the seller allowed the buyer to take the chattel temporarily, for the purpose of trying it, and the buyer then refused to return it to the seller. The delivery would not then be under the contract of sale, but under a special contract of bailment (*t*).

Waiver of lien.—By selling the goods on credit the seller waives his lien during the currency of the credit, unless in the meantime the buyer becomes insolvent; and the same result will follow if after the contract of sale he accepts conditional payment by taking a bill of exchange for the price (*u*), or takes some other security which postpones the date of payment and is therefore inconsistent with the right of lien (*v*).

(*p*) The buyer may re-deliver the goods to the seller or, in certain cases, agree to the seller re-taking possession of the goods (*Bhimji N. Dalal v. Bombay Trust Corporation* (1929) 54 Bom. 381, 124 I. C. 800, ('30) A. B. 306), with the right to hold them on the same terms as if he had the seller's lien: but here the right is created by express contract, and does not, as does the seller's lien property so called, arise by implication of law; and such transactions may amount to a fraudulent preference; *Re O'Sullivan* (1892) 61 L. J. Q. B. 228; cf. *In re Nripendra Kumar Bose* (1929) 56 Cal. 1074, 121 I. C. 745, ('30) A. C. 171. Apart from such an express contract, the seller regains no rights over the goods by obtaining possession of them from the buyer; *Valpy v. Gibson*, *supra*, example (1).

(*q*) *Eduljee v. John Bros.* (1944) Nag. 37, 209 I. C. 356, ('43) A. N. 249.

(*r*) Cf. *Wallace v. Woodgate* (1824) R. & M. 193.

(*s*) Cf. *Litt v. Cowley* (1816) 7 Taunt. 169, 17 R. R. 482, a case of stoppage in transit, but the principle is the same.

(*t*) See *Allen v. Smith* (1862) 11 W. R. 440, Ex. Ch., and cf. *Tempest v. Fitzgerald* (1820) 3 B. & Ald. 680, 22 R. R. 526.

(*u*) The lien will in this case also revive under s. 47 if the seller is still in possession after the term of credit has expired or at the time when the buyer becomes insolvent. See *Miles v. Gorton* (1834) 2 C. & M. 504, 39 R. R. 820.

(*v*) It is essential that the security taken should be inconsistent with the lien; *Angus v. McLachlan* (1883) 23 Ch. Div. 330; *Bank of Africa v. Salisbury Mining Co.* (1892) A. C. 281.

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A lien created by express contract will also negative the lien which arises by implication of law (*w*). The seller may also waive his lien by assenting to a sub-sale; and if he parts with the documents of title and they come into the hands of a third party, he may thereby lose his lien (*x*).

Waiver of lien by wrongful acts.—It is a general rule of law that where a person has a lien on goods, but wrongfully refuses to deliver them up, or deals with them in a manner inconsistent with the mere right to have possession of them, or claims to keep them upon some ground other than his right of lien, he waives the lien. The practical result of this is that he cannot, when sued by the owner, defeat his action by setting up the lien or objecting that the amount due in respect of which the lien is exercisable had not been tendered before action brought (*y*). In the case of a seller's lien this position usually arises where the seller has wrongfully re-sold the goods, and this case is provided for by section 54, but may arise if, for instance, the seller wrongfully consumes the goods (*z*). Presumably in such a case the damages would be the value of the goods, less the purchase price or that part of it which remained unpaid, that is to say, the value of the buyer's actual interest in the goods (*a*).

Lien not destroyed by judgment for the price.—Sub-section (2) declares the common law (*b*). The effect is that though the simple contract debt is merged in the judgment debt, the security is unaffected. If, however, the seller causes the goods to be taken in execution at his own suit, he loses his lien: for he gives up his right to the possession of the goods by letting the sheriff take possession (*c*).

Stoppage in Transit.

50. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller, who has parted with the possession of the goods, has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

(*w*) *In re Leith's Estate* (1866) L. R. 1 P. C. 296, at p. 305.

(*x*) See s. 53.

(*y*) See *Jones v. Tarleton* (1842) 9 M. & W. 675, 60 R. R. 863 (carrier); *Jones v. Cliff* (1883) 1 C. & M. 540, 38 R. R. 686 (case of a person having redeemed goods from pawn at the request of the owner); *Mullinger v. Florence*

(1878) 3 Q. B. D. 484, C. A. (innkeeper); *Yungmann v. Briesemann* (1893) 67 L. T. 642, at p. 644, C. A.

(*z*) *Gurr v. Cuthbert*, *supra*, example (2).

(*a*) *Chinery v. Viall* (1860) 5 H. & N. 288, 120 R. R. 588.

(*b*) *Houlditch v. Desanges* (1818) 2 Stark. 337, 20 R. R. 692.

(*c*) *Jacobs v. Latour* (1828) 5 Bing. 130.

Stoppage in transit.—An interesting account of the earlier history of this right in English reported cases may be found in the judgment of Lord Abinger, C.B. (the value of which for this purpose is not affected by the fact that it was a dissenting one) in *Gibson v. Carruthers* (d), which is extracted and supplemented by some very valuable remarks in Lord Blackburn's book (e). It is not possible, however, to dwell on this here.

In order that the right may be exercised, the following conditions must all be satisfied :—the seller must be unpaid (f); the buyer must be insolvent; the property must have passed (g); the seller must have parted with the possession of the goods and the buyer must not have acquired it. This last condition, as appears from the next section, is that which is shortly expressed by saying that the goods are in transit. Further, the right can only be exercised by a seller or a person in a position analogous to that of a seller (h); the right to stop in transit is unknown outside the law relating to the sale of goods (i). Lastly, it is a right against the goods themselves only. "If they arrive injured and damaged in bulk or quality, the right to stop *in transitu* is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim some moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property" (j).

51. (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.

Duration of
transit.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf

(d) (1841) 8 M. & W. 321, 58 R. R. 713. See also *Booth S. S. Co. v. Cargo Fleet Iron Co.* (1916) 2 K. B. 570, C. A.

(e) Blackburn on Sale, Part 3, Chapter I. The earliest case in our books, *Wiseman v. Vandepuut* (1690) 2 Vern. 203, is not well reported. The Court may or may not have intended to administer a cosmopolitan law of merchants. It does appear, however, that equity was before common law in recognizing the doctrine.

(f) As to this see s. 45 and notes thereto.

(g) As to the right of the seller to withhold or countermand delivery in the case of executory contracts of sale see s. 46 (2).

(h) S. 45 (2).

(i) *Sweet v. Pym* (1800) 1 East, 4, 5 R. R. 497.

(j) *Berndtson v. Strang* (1868) L. R. 3 Ch. App. 588, at p. 591, per Lord Cairns.

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and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

Duration of transit.—This section reproduces section 45 of the English Act, with some slight verbal differences, which do not appear to be material, and replaces section 100 of the Indian Contract Act. It is a concise and successful summary of the law as it had been established at the time when the English Act was passed by a series of decisions in the nineteenth century; and it will best explain the section to cite a few of the most authoritative expositions of the law in those cases, which are most conveniently given in order of date.

1836. *James v. Griffin*, 2 M. & W. 623, 42 R. R. 243.—Goods were consigned by ships to the purchaser deliverable in the river Thames. On their arrival the purchaser, being pressed by the captain of the ship to have them landed, sent his son with directions to land them at a wharf, where he was accustomed to have goods landed for him and to take them thence in his own carts. The purchaser was then insolvent, and told his son that he did not intend to meddle with the goods and that the seller ought to have them. The goods were by the son's directions landed at the wharf, and there they were stopped by the seller. It was held that, as the purchaser had not taken possession of the goods as owner, the transit was not at an end. Parke, B., in the course of his judgment said (2 M. & W., at p. 632, 42 R. R., at p. 253) "The delivery by the vendor of goods sold to a carrier

of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee ; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession. The actual delivery to the vendee or his agent, which puts an end to the *transitus* or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods : *Scott v. Pettit* (k), *Rowe v. Pickford* (l) ; or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself ; *Dixon v. Baldwin* (m) ; or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination. Was the landing and warehousing the goods at the wharf, by the vendee's order, a delivery of them at a warehouse or place of deposit for the vendee, or a taking possession of the goods as owner ? The answer to both these questions depends upon that to a prior question—*quo animo* was that act done." The learned Judge then examined the evidence and came to the same conclusion as the majority of the Court, that the purchaser did not take possession as owner, that is to say he never accepted the goods and consequently the transit was not at an end (n).

1842. *Whitehead v. Anderson*, 9 M. & W. 518, 60 R. R. 819.—Timber was consigned by ship to the buyer at Fleetwood. On arrival of the ship the agent of assignees of the bankrupt buyer went on board, stating to the captain that he had come to take possession of the timber and saw and touched some of it. The captain said that he would deliver it on his freight being paid. Later the seller gave notice of stoppage to the mate,

(k) (1803) 3 Bos. & P. 469, 7 R. R. 804.

(l) (1817) 8 Taunt. 83, 19 R. R. 466.

(m) (1804) 5 East. 175, 7 R. R. 681. Compare *Ex parte Miles* (1885) 15 Q. B. D. 39, C. A.

(n) Compare *Bolton v. The Lancashire and Yorkshire Railway Co.* (1866) L. R. 1 C. P. 431, per Willes, J., at pp. 439, 440. "The right to stop *in transitu* upon the bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee or of one who is his agent, as a warehouseman, or a packer, or a shipping agent to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods *in transitu*. It must be observed that there is, besides the propositions I have stated, and

which are quite familiar, one other proposition which follows as deducible from these, *viz.*, that the arrival which is to divest the vendor's right of stoppage *in transitu* must be such as that the buyer has taken actual or constructive possession of the goods, and that cannot be so long as he repudiates them." Sub-section (4) is based on these cases. The fact that the buyer deliberately refuses to take possession (as in *James v. Griffin*), in order to enable the vendor to stop in transit, does not amount to a fraudulent preference : *Ex parte Cooper* (1879) 11 Ch. Div., at p. 73, per Brett, L. J. It need hardly be said that if the buyer rejects the goods after the transit is ended, *e.g.*, after he has taken possession of them by himself or some agent, the seller's right to stop the goods is not revived : *Jobson v. Eppenheim* (1905) 21 T.L.R. 468.

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who, in the absence of the captain on shore, was in charge of the ship and cargo. The timber was subsequently delivered to the seller's agent. It was held that there was no actual taking of possession by the assignees, and no contract by the captain to hold the goods on their behalf as their agent, so that there was no constructive possession of the goods by them.

The judgment of the Court was delivered by Parke, B., who said (9 M. & W. at p. 534, 60 R. R. at p. 833): "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee takes them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end. This is a case of actual possession, which certainly did not occur in the present instance. A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given to him . . . There is no proof of any such contract. A promise by the captain to the agent of the assignees is stated, but it is no more than a promise, without a new consideration, to fulfil the original contract and deliver in due course to the consignee, on payment of freight, which leaves the captain in the same situation as before; after the agreement he remained a mere agent for expediting the cargo to its original destination" (o).

(o) The statement that "if the vendee takes the goods out of the possession of the carrier into his own before the arrival *without* the consent of the carrier" the transit would be at an end, was challenged by Lord Blackburn (Blackburn on Sale, pp. 374-5) who suggested that the true principle was that "the question whether actual possession taken by the vendee against the assent of the carrier terminates the *transitus* or not, depends on the carrier's right to insist on continuing to hold (the goods) on the original consignment. And possibly an unequivocal demand of possession made upon the middleman and refused by him, may have the same effect upon the *transitus* that an actual taking of possession against the assent of the middleman would have had. That is, it would terminate the *transitus* if the refusal was so tortious as to render the middleman liable in trover, just as the actual taking of possession would terminate the *transitus* if it was justifiable against the middleman." It is conceived that the Act adopts this view. The words of sub-section (2) are not apt to describe a tortious taking of posses-

sion, and they may be compared with s. 49 (1) (b), and the principle in both cases would appear to be the same. On the other hand the words of sub-section (6) are wide enough to cover a wrongful refusal by the carrier to deliver before the goods have reached their destination. When goods are carried by sea, the carrier by the bill of lading engages to deliver at the place of destination and it therefore gives no authority to the consignee to demand the goods before their arrival at that place: *op. cit.*, p. 372, citing Abbott on Shipping: *Holst v. Pownall* (1794) 1 Esp. 240, per Lord Kenyon, whose ruling was affirmed by the King's Bench: *Jackson v. Nichol* (1839) 5 Bing. N. C. 508, 50 R. R. 777; cf. *Booth Steam Ship Co. v. Cargo Fleet Iron Co.* (1916) 2 K. B. 570, at p. 600, C. A. But in the case of carriage by land the position may be different, see *London & North Western Ry. v. Bartlett* (1861) 7 H. & N. 400, 126 R. R. 481; *Cork Distilleries Co. v. Great Southern Ry.* (1874) L. R. 7 H. L. 269, and cf. *Wright v. Lawes* (1801) 4 Esp. 28; *Mills v. Ball* (1801) 2 B. & P. 457, at p. 461, 5 R. R. 633.

1850. *Bird v. Brown*, 4 Ex. 786, 80 R. R. 775.—A pretended notice to stop the goods in transit was given by some merchants, who had however no authority from the seller to give it. Subsequently the assignees of the bankrupt buyer formally demanded the goods from the carrier, tendering the freight at the same time. The carrier refused to deliver to them and on the same day delivered them to the merchants, who had given the ineffectual notice to stop. The transit was held to be at an end and both the carrier and merchants were liable in trover: and a later attempt by the seller to ratify the stoppage of the goods by the merchants was of no effect.

The judgment of the Court was delivered by Rolfe, B. who said (4 Ex. p. 797): "There could be no valid stoppage *in transitu* after the formal demand of the goods by Bird and the subsequent delivery of them to the defendants. The goods had then arrived at Liverpool and were ready to be delivered to the parties entitled. Bird, on behalf of the assignees, demanded the goods and tendered the amount due for the freight. Assuming that there had been no previous stoppage *in transitu*, the master . . . was thereupon bound to deliver up the goods to Bird as representing (the buyers) and he could not by his wrongful detainer of them and delivering them over to other parties, prolong the *transitus* and so extend the period during which stoppage might be made."

1867. *Schotmans v. Lancashire & Yorkshire Ry. Co.*, L. R. 2 Ch. App. 332.—The goods were delivered on board a ship belonging to the buyer, which was employed as a general trader. By the bills of lading the goods were deliverable to the buyer or his assigns. This was held to be a delivery to the buyer, so as to preclude the right to stop in transit before the arrival of the goods at the port of consignment.

Lord Chelmsford said, at pp. 335, 336: "If the goods are actually delivered to an agent of the vendee employed by him to receive delivery, the vendor is divested of his right of stoppage *in transitu*. On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. . . . If the vendor desires to protect himself, he may. . . . preserve his right of stoppage *in transitu* by taking bills of lading, making the goods deliverable to his order or assigns."

Cairns, L. J., *ibid*, at p. 338: "The essential feature of a stoppage *in transitu*. . . is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them. It was suggested here that the master of the ship was a person filling this character,

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but the master of the ship is the servant of the owner, and if the master would be liable because of the delivery of the goods to him, the same delivery would be a delivery to the owner, because delivery to the agent is delivery to the principal" (p).

1879. *Ex parte Cooper*, 11 Ch. D. 68, James, L. J., at pp. 77, 78 (after the several members of the Court had given judgment on the special facts) (q).—"I think that our decision, in which we are unanimous, may be expressed thus: When goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not

(p) It is obvious that if the goods were to be put on the buyer's own cart or barge, which he had sent for them, they would not be in transit: and the same reasoning applies when they are put on board the buyer's own ship, unless the seller protects himself by refusing to appropriate the goods to the contract unconditionally, as by taking the bill of lading in his own favour. See sec. 25 (2). The master of the buyer's ship will then only hold the goods as carrier, not as the buyer's agent. If there is, in such a case, a conditional appropriation and the condition is to be fulfilled by the buyer accepting a bill drawn against the goods, his acceptance while the goods are in transit makes him the owner of the goods, but does not make the carrier hold as his agent or servant. See *Cahn v. Pockett's Bristol, etc., Co.* (1899) 1 Q. B. 643, C. A., cited in the notes to s. 30, where the discussion of principles is instructive. The rule was taken for granted in *Van Casteel v. Booker* (1848) 2 Ex. 691, 76 R. R. 729, the only question in that case being the effect of the bill of lading. Sub-section (5) implicitly recognizes the rule, and deals with the special case where the goods are put on board a ship which is not the buyer's own but chartered by him. The matter cannot be better put than it was by Lord Blackburn: (*Blackburn on Sale*, p. 352). "In the majority of cases, the shipowner does not part with the possession of the vessel to the charterer, he does no more than contract to employ the vessel and the services of the master and crew for a time exclusively for the benefit of the charterer: so that the master remains the servant of the shipowner, and not of

the charterer, and his possession is the possession of the shipowner, and not of the charterer in any case in which their rights come in question. But though this is the usual contract between the shipowner and the charterer, they may in law, and in practice sometimes do agree, that the charterer shall during the voyage have the possession of the vessel, and that the master shall during that time be the servant of the charterer. In other words (the) charter party . . . may amount to a demise of the vessel, and of the services of the master and crew . . . When, therefore, goods are put into the possession of the master of a ship, they are in general in the possession of the shipowner, who, as it is evident, is an agent to forward the goods, and therefore goods on shipboard in general are *in transitu* but where the master is not the servant of the shipowner, but the immediate servant of the charterer, the goods by being put into possession of the master are put in the possession of the charterer, and, therefore, if the charterer be also the purchaser, they are no longer *in transitu*." The cases of *Bernadson v. Strang* (1868) L. R. 3 Ch. App. 588 and *Ex parte Rosevear China Co.*, cited in the text (see next page) illustrate the first proposition.

(q) The notice to stop in this case had been given after part of the cargo had been delivered and part of the freight paid, but before the whole of the freight had been paid. The case, therefore, is also an illustration of sub-section (7). The principles applicable to this question have already been sufficiently discussed in the notes to sections 34 and 48.

as carrier, but as his agent. Of course the same principle will apply to a warehouseman or a wharfinger" (r).

1879. *Ex parte Rosevear China Clay Company*, 11 Ch. D. 560.—A contract was made for the sale of some china clay f.o.b. at Fowey. The buyer chartered a ship and gave notice to the sellers, who delivered the clay on board at Fowey. The destination of the clay had never been communicated by the buyer to the sellers, but in fact it was to be carried to Glasgow. No bill of lading was signed and before the ship left the port the sellers gave notice stopping the goods. Held by the Court of Appeal that the stoppage was good. James, L. J., at p. 568: "The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. . . . It is admitted that, if it had been mentioned in the original contract for sale that the goods were to be carried to Glasgow, the present case could not have been distinguished from *Berndtson v. Strang* (s), but it is said that the fact that no ultimate destination was mentioned affords a distinction. It seems to me, however, that the mere fact that the port of destination was left uncertain, or was changed after the contract for sale, can make no difference. The principle is this, that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right, which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier."

Cotton, L. J., *ibid*, at pp. 571, 572: "I think it is clearly established that so long as goods are in the hands of a carrier as carrier they are not in the actual possession of the purchaser, whoever may have nominated the carrier. The contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him, whether he be the vendor or the purchaser of the goods. . . . Here the contract was that the goods were to be placed on board by the vendors, not by the

(r) It will be observed that the seller's assent is not in this case necessary: the agreement can be made between the carrier and buyer alone. For an example see *Kendal v. Marshall Stevens & Co.* (1883) 11 Q.B.D. 356, C.A. where the agreement was between the carrier (a railway company) and an agent of the buyer. The mere fact that the freight is not paid is not conclusive against such an agreement. "The agent to forward may very well agree to hold the goods as an agent to keep the goods, without thereby abandoning any lien which he may have in the capacity of carrier for freight or otherwise. He may in subs-

tance say 'I will hold the goods for you and at your disposal, but neither you nor any one else shall take them away without paying my charges'; and if such an agreement is come to, the transitus is ended. It is therefore no conclusive test of a transitus or none, whether the buyer has acquired an immediate right to the possession or not, though it may afford strong evidence as to the nature of the actual holder's possession, which it is conceived depends upon mutual intention." Blackburn on Sale, p. 367; cf. *Kemp v. Falk* (1882) 7 App. Cas., at p. 584.

(s) (1868) L. R. 3 Ch. App. 588.

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purchaser. The purchaser was to indicate where the goods were to go, and only when they had reached that destination would they come into his actual possession."

1887. *Bethell v. Clark*, 19 Q.B.D. 553, 20 Q.B.D. 615, C.A.—The buyer bought goods of Messrs. Clark & Co., the defendants, at Wolverhampton, and after the contract was made, sent them a consignment note in these terms: "Please consign the ten hogsheads hollow ware to S.S. 'Darling Downs' to Melbourne, loading in the East India Docks here." The goods were sent by railway, and the railway company shipped them, and obtained and sent the mate's receipt to the buyer, but the latter did nothing with it. The sellers gave notice to the railway company stopping the goods, but too late to prevent shipment, and the ship sailed with the goods on board. Before she arrived at Melbourne the sellers gave notice to the shipowners (t) claiming the goods as their property. After the arrival at Melbourne the trustee in bankruptcy of the buyer demanded the bills of lading from the master. Held that the goods had been effectually stopped, the transit not terminating until the ship had reached Melbourne.

Cave, J., 19 Q. B. D., at p. 561: "In all cases of stoppage *in transitu*, it is necessary first of all to ascertain what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment that the goods are delivered by the vendor to a carrier to be carried to the purchaser the *transitus* begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale or by directions given by the purchaser to the vendor (u). But, however fixed, the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles."

1888. Lord Esher, M. R. (*same case on appeal*), 20 Q. B. D., at p. 617.—"When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to

(t) See section 52 (1).

(u) This is what is described by the section as "the appointed destination." The case of *Rosevear China Clay Co.*,

supra, p. 211, however, shows that it is not absolutely necessary that the destination should be actually named.

pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit has begun. The way in which that question has been dealt with is this. Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists ; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit."

1890. *Lyons v. Hoffnung*, 15 App. Cas. 391, P.C.—The buyer at Sydney instructed the seller's agent to send the goods when packed and marked to a named wharf in Sydney. He said the goods were going with him. Receipts were given by the shipowners, describing *Hoffnung & Co.* the sellers, as the shippers, *Clare*, the buyer, as the consignee, and *Kimberley* (in Western Australia) as the place of destination. *Clare* became insolvent after the goods left Sydney and before they arrived at *Kimberley*, and *Hoffnung & Co.* stopped the goods. It did not appear whether *Clare* did or did not in fact sail in the same ship, but their Lordships held it clearly not material.

Lord Herschell in delivering the judgment of the Judicial Committee said, at pp. 396-397: "The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendor into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale ; because, although the language used by *Clare* according to his evidence was that he was going to *Kimberley*, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men ; and it is obvious that *Clare* was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him.

These circumstances appear to their Lordships sufficient to indicate that the right to stop *in transitu* existed.... The law appears to their Lordships to be very accurately and clearly laid down by the Master of the Rolls in the case of *Bethell v. Clark*." (See p. 212, above).

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It must be observed that it is really a question of fact, depending on the intention of the parties, whether dealing with goods at this or that point, say at a port of embarkation after a railway journey, are the end of a first transit to be followed by a new one, or only an incident in one continuous transit (v). The fact that directions for forwarding are given by the buyer may co exist with a contract leaving him no option as to the ultimate destination and therefore with a continuing transit. On the other hand delivery to a commission agent for the ultimate buyer, such an agent being himself the buyer as regards the original seller (w), or to a forwarding agent, appointed by the buyer, who is to receive his orders from the buyer (x), may show that the transit is at an end. In this connexion it is, no doubt, very material to ascertain what is the "appointed destination" and even whether the destination is fixed by the original contract or by directions given by the buyer to the seller, for in the latter case the buyer may be within his rights in interrupting the transit. If he does so, and the goods cannot be set in motion again without further orders from the buyer, the transit is at an end (y).

Indian authorities.—Indian authorities have closely followed on the lines thus marked out by the English courts. In *G. I. P. Ry. Co. v. Hanmandas* (z) goods were delivered by the vendor to a railway company for conveyance to their place of destination. It was held that the transit determined on payment of freight to the company by an endorser of the railway receipt for the goods from the purchaser, and on his loading the goods in his carts, and that the company had no right to stop the goods on behalf of the unpaid vendor on notice from him of the buyer's insolvency, merely because the carts had not then left the goods compound of the railway station.

A tortious act of the carrier after the goods are "at home," such as delivery to a person purporting to claim under the unpaid seller's authority but not having authority in fact, cannot defeat the buyer's right (a)

(v) *Ex parte Watson* (1877) 5 Ch. Div. 35, C.A.

(w) *Ex parte Miles* (1885) 15 Q. B. D. 39, C. A. The remark of Brett, L. J., ad. fin., at p. 47, is instructive (leave had been asked to appeal to the House of Lords). "If there was a question of law we might consider it, but it is only a question of fact;" cf. *Kemp v. Iemay Imrie & Co.* (1909) 14 Com. Cas. 202, 100 L. T. 996, at p. 997, per Lord Alverstone. C. J. in that case the commission agents gave further instructions to the sellers as to the shipment of the goods to Australia, where their principal resided; and it was held that the transit continued and was not determined by the receipt of the goods by the defendants (the com-

mission agents) at Liverpool.

(x) *Kendal v. Marshall, Stevens & Co.* (1883) 11 Q. B. D. 356, C.A.

(y) *Reddall v. Union Castle Mail S. S. Co.* (1914) 20 Com. Cas. 86.

(z) (1889) 14 Bom. 57. The facts in this case are much like those of *Ex parte Gibbes* (1875) 1 Ch. Div. 101.

(a) *Bird v. Brown* (1850) 4 Ex. 786, 80 R. R. 775 (set out p. 254 ante), cited in *Lilladhar v. George Wreford*, *infra*, note (c), at p. 88. Authority cannot be conferred by ratification unless the principal could have effectually authorized the act when done. See Pollock and Mulla, commentary on s. 196 of the Indian Contract Act, p. 552.

nor, on the other hand, does a mistaken or otherwise wrongful delivery of goods by the carrier after notice to stop in transit defeat the right of the unpaid seller (b).

Public wharves.—The effect of landing goods at wharves belonging to public bodies like the Trustees of the Port of Bombay, constituted by Bombay Act VI of 1879, was considered by Farrøn, J., in *Lilladhar v. George Wreford (c)*, where the learned Judge after citing *Barber v. Meyerstein (d)* and *Glyn Mills & Co. v. East and West India Dock Co. (e)* proceeded to say "From this it would seem to follow that so long as (the goods) are subject to a lien for freight, the transit is not ended. The goods are not at home. The converse proposition would, however, seem also to be true, that when the shipowner lands the goods under the Statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforward the goods are held by the statutable wharfingers for the consignee alone."

Stoppage of part of the goods.—Section 106 of the Indian Contract Act provided that "Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid:" and gave as illustration "A sells to B 100 bales of cotton; 60 bales having come into B's possession and 40 being still in transit, B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid."

This is not re-enacted by the Act, for it is only an illustration of the general rule, already noticed (f), that the seller's lien is available so long as he holds any part of the goods, and the seller who resumes possession on exercising his right of stoppage in transit is in the same position as the seller who has never parted with the goods (g). Accordingly, if goods are sent partly by one route and partly by another, and one parcel reaches the buyer, and the other is stopped before it does so, the seller can hold the part successfully stopped until the price of the whole is paid (h).

(b) See s. 53 (2) and note thereto.
(c) (1892) 17 Bom. 62, at pp. 91-92.

(d) (1870) L. R. 4 H. L. 317.

(e) (1882) 7 App. Cas. 591.

(f) See s. 48 and notes thereto.

(g) See s. 54 and notes thereto.

(h) *Wentworth v. Outhwaite* (1842) 10 M. & W. 436, 62 R. R. 664. The doubts which existed at that time as to whether the exercise of the right of stoppage in transit rescinded the contract are now set at rest by s. 54: and now it is also

clear law that, as the contract is not rescinded, the property does not re-vest in the seller. It is quite obvious therefore that it is no longer open to any question that the seller has no rights whatever over the goods which reach the buyer in such a case. It was only on the assumption that the property re-vested in the seller that it could be argued, as was argued in that case, that he had the right to retake the goods which had reached the possession of the buyer.

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52. (1) The unpaid seller may exercise his right of stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, shall be given at such time and in such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

Examples.—The section may be illustrated by the following examples :—

(1) A railway company is in possession of goods as carriers when the sellers give notice of stoppage in transit. A sum of money is owing by the buyers to the railway company. The railway company is not entitled to set up in priority to the seller's right of stoppage in transit a general lien exercisable by the company against the buyers as owners of the goods (i).

(2) An unpaid seller stops goods sent by sea at a port short of their destination. He is liable for the freight, not only to the port where the goods were actually landed, but also to the port of their ultimate destination (j).

How stoppage in transit is effected.—Sub-section (1) is identical with section 46 (1) of the English Act, and sections 104 and 105 of the Indian Contract Act, which it replaces, were substantially the same.

The first part of the sub-section cannot be made plainer by illustration : it corresponds to long settled English law. "At one time it seems to have been supposed," wrote Lord Blackburn, "that in order to make a good stoppage *in transitu* there must have been an actual taking possession of the goods by the vendor or his agent, but it is now clearly settled that the vendor's rights are complete on giving the person who has the possession of the goods notice of the vendor's claim to stop the goods

(i) *U. S. Steel Products Co. v. G. W. R.* (1916) 1 A. C. 189. | (j) *Booth S. S. Co. v. Cargo Fleet Iron Co., Ltd.* (1916) 2 K. B. 570, C.A.

at a time when he can obey it, although there is neither an actual taking of possession by the person stopping the goods, nor such an assent on the part of the holder as would amount to a constructive possession" (k).

Notice to principal.—It is also well established that if the right is exercised by the seller giving notice of his claim, the notice may be given to the principal of the person who is in actual possession of the goods. Where the transit is by sea that expression includes the shipowner, who is the person most likely to know where the ship and its master are to be found. Lord Blackburn said in the House of Lords in 1882, commenting on a doubt on this point, expressed in the Court of Appeal, "I had always myself understood that the law was that when you became aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way, of stopping them *in transitu* was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that, although such a notice, if sent, cast upon the ship-owner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu*. I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage *in transitu*" (l).

In order that such a notice may be effectual, however, it must be so given that the principal can by the exercise of due diligence communicate with his servant or agent, for "the only duty that can be imposed on the absent principal is to use reasonable diligence to prevent delivery" (m). The sub-section, more by implication than any express words, makes it the duty of the principal to use such diligence, but it is reasonably clear that if the principal took no steps to communicate with his agent when it was open to him to do so, he would be liable to the seller for a breach of the obligations imposed upon the carrier by the next sub-section (n).

(k) Blackburn on Sale, 1st edition (1845), p. 267, ed. Graham, pp. 382-3. The stoppage must be exercised by taking or claiming the goods as by a right paramount to that of the buyer, *ibid*, citing *Stiffken v. Wray* (1805) 6 East, 371; but not necessarily against the buyer's consent; *Mills v. Ball* (1801) 2 B. & P. 457, 5 R. R. 653. Demanding the bill of lading from the shipowner, retained by him as security for unpaid freight, is

sufficient; *Ex parte Watson* (1877) 5 Ch. D. 35, C.A. See too *Kemp v. Ismay* (1909) 100 L. T. 996.

(l) *Kemp v. Falk*, 7 App. Cas., at p. 585.

(m) *Whitehead v. Anderson* (1842) 9 M. & W. 518, 534, 60 R. R. 819, 832. The concluding paragraph of sub-section (1) closely follows the judgment of the Court in that case.

(n) See *Litt v. Cowley*, *infra*, note (r).

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It is at least doubtful whether a notice of stoppage in transit addressed only to the consignee and not to the shipowner or master is effectual (o).

Duties of the carrier and the seller.—The effect of the notice to stop in transit when given effectually, whether to the person in actual possession of the goods or his principal, is to revest the right to the possession (p) of the goods in the seller. Thereafter the carrier holds them as his agent, and, subject to the carrier's lien on the goods for their freight, which arises from the common law, whether the carrier be a carrier by land or sea, and prevails against the rights of the seller as well as those of the consignee (q), he must deliver them as the seller directs. If therefore by mistake, or by reason of the principal not using due diligence to communicate with his agent to stop the delivery, or otherwise, the goods are delivered to the buyer, the carrier is liable for damages for conversion, and the buyer or his trustee in bankruptcy must restore them on demand to the seller, and on his failing to do so, is also liable to be sued in trover by the seller (r).

It follows from the provisions of the previous sub-section, that if the notice be given to the principal, but not so as to enable him by the use of due diligence to stop the delivery to the buyer by his agent, neither he nor the agent will be liable to the seller (s), and the buyer will have lawfully obtained possession, and the transit will have come to an end.

The seller may also enforce his rights by injunction, or if the goods are in the hands of the master, by arrest of the ship (t).

The carrier must give effect to the seller's claim, as soon as he is satisfied that it is made by, or on behalf of, the seller, unless he is aware of a legal defeasance of the claim, for the seller exercises his right at his peril and need not satisfy the carrier that he is justified in stopping the goods (u). In cases of real doubt, therefore, the carrier ought to interplead (v), lest by re-delivering the goods to the seller he should render himself liable to an action for conversion at the suit of the buyer (w).

(o) *Phelps Stokes & Co. v. Comber* (1885) 29 Ch. Div. 813, 822, 825, C.A.

(p) Not "the property" as stated in some of the older cases. "The vendor by stopping goods *in transitu* does not thereby regain the property in them, nor does he thereby cancel the sale" per Lord Atkinson, *United States Steel Products Co. v. G. W. Ry.*, *supra*, example (1), at p. 203 (cf. s. 54 (1)).

(q) *Ib.*, at p. 195. In that case the railway company sought to set up against the seller a general lien, which they claimed by virtue of the terms of their consignment note: but the claim was

disallowed.

(r) *Litt v. Cowley* (1816) 7 Taunt. 169, 17 R. R. 482, cited in *Lilladhar v. George Wreford* (1892) 17 Bom. 62, where the plaintiff's name is misprinted "*Sett.*" *Re Deveze, ex parte Cole* (1873) L. R. 9 Ch. App. 27.

(s) Cf. *Whitehead v. Anderson*, *supra*, note (m).

(t) *The Tigress* (1863) 32 L. J. Adm. 97.

(u) *Ib.*, at p. 101.

(v) *Ib.*, at p. 102.

(w) *Taylor v. G. E. Ry.* (1901) 1 K. B. 774, and see notes to s. 49, pp. 202-204 *ante*.

Correlative to the duty of the carrier to the seller, is the duty of the seller to the carrier to give directions as to the delivery of the goods, and to pay the expenses thereby incurred. Failure to do so may render him liable in damages to the carrier (x).

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Transfer by Buyer and Seller.

53. (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto :

Effect of sub-sale
or pledge by buyer.

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

(2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

Examples.—The section may be illustrated by the following examples :—

(1) The defendant sold a quantity of oil to some merchants, who re-sold a portion to the plaintiffs, giving them delivery orders addressed to the defendants requiring the latter to deliver to the plaintiffs "ex our contract." The defendants retained the orders when presented, and either made no comments when doing so, or told the plaintiffs that they were in order, and entered the plaintiffs' names in their books. The merchants, who bought from the defendants, at first kept up their payments, and the defendants duly delivered the oil to the plaintiffs. Later the merchants fell into arrears with their payments and thereupon the

(x) *Booth Steamship Co. v. Cargo Fleet Iron Co.*, *supra*, example (2).

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defendants, claiming to exercise their right of lien, refused to make further deliveries to the plaintiffs. It was held that the defendants were entitled to do so (y).

(2) *A* sells *B* 80 maunds of grain out of a larger quantity lying in his granary. *B* sells 60 maunds out of those, the goods not yet being ascertained, to *C*. Then *C* having a delivery order from *B* forwards it to *A*, who informs *C* that he will send the grain in due course. If *B* now becomes insolvent, *A* cannot refuse to deliver the 60 maunds of grain to *C*, though he may retain the remaining 20 against *B* (z).

(3) The defendants entered into a contract to sell a quantity of seed, payment to be made in London on vessel's arrival before Hamburg by cash in exchange for shipping documents and/or delivery order. Subsequently the buyers sold 500 tons of the seed to the plaintiffs on the same terms as to payment. The defendants received a consignment of 6,400 bags at Hamburg, and in exchange for the buyers' cheque for the price of 2,640 bags, gave them two delivery orders to their Hamburg house for 960 and 1,680 bags respectively from that consignment. The buyers endorsed these orders to the plaintiffs in exchange for the price. The cheque given by the buyers to the defendants was dishonoured, and the defendants thereupon refused to deliver any seed to the plaintiffs. It was held that this refusal was wrongful (a).

Seller's rights not affected by the buyer's dealing with the goods.—It was laid down as early as 1833 that, as regards the unpaid seller's rights, "a second vendee (of a chattel) is in no better situation than the first" (b), and although the Indian Contract Act dealt in separate sections (c) with the rule as it affected the seller's lien and right of stoppage in transit, the principles have always been treated as identical in the two cases. As regards the latter right, the existence of this rule shows that whatever that right may once have been, it has not been in modern times a merely equitable right; for all equitable rights, being in their essence personal, are liable to be defeated by a purchaser of the legal estate or interest for value and without notice.

Lord Blackburn thus stated the rule: A purchaser who has acquired ownership "may sell the goods subject to the first vendor's rights, and if he does so, the property is transferred to the second purchaser by the second

(y) *Mordaunt Brothers v. The British Oil and Cake Mills, Ltd.* (1910) 2 K. B. 502.

(z) *Knights v. Wiffen* (1870) L. R. 5 Q. B. 660.

(a) *Ant. Jurgens Margarinefabrieken v. Louis Dreyfus & Co.* (1914) 3 K. B. 40. Cf. *Anglo-India Jute Mills v. Omademull*

(1911) 38 Cal. 127, 10 I.C. 859.

(b) *Dixon v. Yates* (1833) 5 B. & Ad. 313, 339, 37 R. R. 489. The real question in that case was whether the dealing with the goods amounted to a delivery to the buyer. See notes to ss. 34 and 48.

(c) Ss. 98 and 101.

bargain and sale without any delivery of possession. But though the second purchaser acquires by his bargain and sale the legal property in the goods and every right which his immediate bargainor had in the goods, yet (if there be not an assignment of the bill of lading) he acquires no greater right; he takes the property subject to the same restrictions that his immediate vendor held it under" (d). The above statement must now be read with the further qualification, "or if there be no transfer of some other document of title," but the position at common law is well illustrated by the case of *McEwan v. Smith* (e), where A was the owner of specific goods lying in N's warehouse, and held by N on A's account. A sold those goods to B and took from B a bill of exchange for the price and handed B a delivery order addressed to N. B resold the goods to C and gave C a delivery order, but before C could obtain possession of the goods, B became insolvent, and A warned N not to deliver to anyone without A's order. A had not lost his lien on the goods, and was entitled to hold them as against C.

Estoppel.—But even at common law, if the original seller recognizes the title of a subsequent buyer without reserving his own rights, he is estopped from claiming a lien (f); and a sub-sale may even take effect by way of estoppel, notwithstanding that no specific goods had been appropriated as between the seller and the first buyer, though it may be more difficult to establish than it is when the goods are specific (g). The assent to the sub-sale, however, so as to affect the seller's right of lien must "be such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods. It is not enough to show that the fact of a sub-contract has been brought to his notice, and that he has assented to it merely in the sense of acknowledging the receipt of the information" (h). The rule has nothing to do with constructive delivery; the ground is estoppel by the seller's conduct amounting to an assurance to a subsequent buyer that the goods are at his disposal free from any adverse claim by the seller. The important exception to the general rule noted by Lord Blackburn in the passage above quoted, which operates where the bill of lading has been assigned for value, is preserved in the proviso to this sub-section. Nothing short of this, however, will prevent the application of the rule; for example, the existence of a bill of lading made out in

(d) Blackburn on Sale, p. 386.

(e) (1849) 2 H.L.C. 309, 81 R. R. 166. The case was complicated through various things being done through an agent of the seller's who was apparently supposed to have custody or control of the goods but had not.

(f) *Knights v. Wiffen*, *supra*, example (2). In the earlier case of *Woodley v. Coventry* (1863) 2 H. & C. 164, 133 R. R.

633, the facts are almost identical. Compare *Pearson v. Dawson* (1858) E. B. & E. 448, 113 R. R. 724.

(g) See *Farmeloe v. Bain* (1876) C.P.D., 445; *Mordaunt Brothers v. British Oil and Cake Mills, Ltd.*, *supra*, example (1).

(h) *Mordaunt Brothers v. British Oil and Cake Mills, Ltd.*, *supra*, at p. 507.

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the sub-purchaser's name but not delivered to him is not sufficient (i). Neither is any kind of agreement with the sub-purchaser, even for payment, unaccompanied by endorsement of the bill of lading (j).

Transfer of the bill of lading.—It has long been established at common law that the unpaid seller's right to stop the goods in transit is defeated by the transfer of the bill of lading to a third party, who takes it in good faith and for valuable consideration, so that, to use the words of a great Judge, bills of lading are made negotiable in a limited sense as against stoppage *in transitu* only (k). Where the transfer is such as absolutely to pass the property in the goods, the seller's right is completely defeated; where it operates as a pledge or mortgage of the goods, the seller has still the right to stop all the property which remains in the buyer, but it cannot be exercised so as to affect the interests of the transferee. He must either pay the mortgagee or pledgee the amount secured by the mortgage or pledge, or content himself with receiving any surplus realized by the sale of the goods over the amount so secured.

The best judicial exposition of the general principle is in a judgment of Lord Blackburn which, for the present purpose, gives a sufficient view of the facts he was dealing with. "It appears that Mr. Falk of Liverpool had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed not as is usual by the master, but by the shipowner himself, and that Mr. Kiell got those bills of lading. Now so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange had no right whatever to meddle with those goods further, unless before the end of the *transitus* (I shall say a word presently as to what comes at the end of the *transitus*) Kiell the purchaser became insolvent and stopped payment, and then if Falk had stopped the goods *in transitu*, he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the *transitu* came, his right to stop the goods *in transitu* might be defeated by an endorsement upon the bill of lading to a person who gave value. In the present case there was such an endorsement and transfer of the bill of lading,

(i) *Ex parte Golding, Davis and Co.* (1880) 13 Ch. Div. 628, C.A.; *Bapuji Sorabji v. The Clan Line Steamers* (1910) 34 Bom. 640, 7 I.C. 650. *Aliter*, if the bill of lading is actually delivered to the sub-purchaser in whose name it has been made out. *Ramendra Nath Roy v. Brajendra Nath Dass* (1919) 46 Cal. 831, 53 I.C. 986.
(j) *Kemp v. Falk*, 7 App. Cas. 573. See especially per Lord Blackburn, at

p. 582. "No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu* unless there were an endorsement of the bill of lading."

(k) Willes, J., in *Fuentes v. Montis* (1868) L.R. 3 C.P., at p. 276. Bills of lading are not negotiable instruments in the full sense of the term; see notes to s. 2 (4), *ante*, pp. 8-9.

but it was only an endorsement and transfer for a particular and limited purpose. It appears that Mr. Kiell in order to obtain an advance got Messrs. T. Wiseman & Co. of Glasgow, the correspondents and agents of Messrs. Wiseman, Mitchell Reid & Co. of Calcutta, to make an advance in his favour by drawing a bill of exchange upon him; and to secure the payment of that bill of exchange the bill of lading was endorsed, and the Bank of Scotland who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of stoppage *in transitu* at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee, or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop *in transitu* everything which was not covered by that pledge. That was settled, and has been considered law, or rather equity, ever since the case of *In re Westzinthus* (l), and has been affirmed in *Spalding v. Ruding* (m), and I have no doubt it is very good law upon that point " (n)

Consideration.—As regards consideration, it would appear that the proviso will include the case of a transfer of the bill of lading to a second buyer where the sale is on credit and the term of credit has not expired, for a solvent buyer's promise is certainly a valuable consideration and insolvency is not to be presumed. It is the better opinion in England that in such a case the right to stop in transit is defeated, and the original seller has not any substituted equitable right against the purchase money, but there is no positive decision (o)

Antecedent debt.—It also appears that an antecedent debt is a valuable consideration within the meaning of the proviso, so that in this respect the law is altered, for under section 103 of the Indian Contract Act, illustration (b), the pledging of a bill of lading by B with C to secure a sum due on a general balance of account from B to C was declared not to defeat the right to stop in transit. That illustration was suggested by the English case of *Spalding v. Ruding* (p), but what was decided in that case was first, that when a bill of lading was transferred to secure a specific advance, the seller's right to stop the goods was subject to the rights of the pledgee, so

(l) (1833) 5 B. & Ad. 817, 39 R. R. 665.

(m) (1843) 6 Beav. 376, 63 R. R. 120.

(n) *Kemp v. Falk* (1882) 7 App. Cas., at pp. 581-582.

(o) Lord Selborne in *Kemp v. Falk* (1882) 7 App. Cas. 573, at p. 577 and see Chalmers, p. 116. *Ex parte Golding Davis & Co.* (1880) 13 Ch. Div. 628, C.A., does not decide the contrary and there the sub-purchaser never got the bill of lading, and the seller's right to come upon the purchase money was in

substitution of the right to stop the goods themselves, the contract with the sub-purchaser having been carried out by consent. But such a doctrine is more or less involved in the language of the judgments. The point is fully discussed by the learned editor of Benjamin on Sale, pp. 967, 968. The view shortly expressed here is identical with his.

(p) (1843) 6 Beav. 376, 12 L.J. Ch. 503, 63 R.R. 120.

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that the seller must pay the amount advanced by the pledgee before he could validly stop the goods—which has long been settled law—and second, that the transferee of the bill of lading for a definite advance, could not, just because the transferor happened to be insolvent, also claim to be satisfied for his general balance of account in priority to the seller's claim to stop in transit. But there is no such rule in English authorities as that a transfer of a bill of lading *expressly* to secure a balance of account or any other existing debt will not prevail over the right to stop in transit. The framers of the Indian Contract Act apparently interpreted *Spalding v. Ruding* in the light of the opinion of the Judicial Committee in 1869, that a bill of lading given to secure an antecedent debt was not effectual against the unpaid seller (*q*), but the Court of Appeal in England subsequently held the contrary (*r*), not finding any principle or authority to support the novel distinction, as they considered it, introduced by the Judicial Committee. The present Act adopts the view of the Court of Appeal in *Leask v. Scott*, for like the English Act, it only requires that the transferee should take in good faith and for consideration (*s*). In the present state of the law, therefore, there can be no question but that the ruling of the Court in *Peacock v. Baignath* (*t*), that “the requirements of the section are complied with when it is shown that any sum is advanced on the terms that it is to be secured by the particular bill of lading in question or the goods represented by it, though it may be secured by other bills or goods also, and though the bill of lading may have been intended to be security not only for the particular sum or sums advanced upon it but also for some antecedent liability,” is correct: indeed, the difficulty no longer arises. Still, it must be shown that it was agreed between the transferor and the transferee that the antecedent debt should be the consideration for the transfer; the second proposition in *Spalding v. Ruding* therefore is still good law. So if the

(*q*) *Rodger v. Comptoir d'Escompte de Paris* (1869) L. R. 2 P.C. 393. (Lord Chelmsford, Sir James Colville, Sir Joseph Napier.)

(*r*) *Leask v. Scott* (1877) 2 Q.B.D. 376. (Lord Coleridge, C. J., Bramwell and Brett, L. J. J.) This was clearly the stronger Court of the two on a question of mercantile law. The real consideration, as pointed out in *Leask v. Scott*, is present forbearance on the creditor's part, and forbearance coupled with release was held sufficient by the Judicial Committee itself in *Chartered Bank of India v. Henderson* (1874) L. R. 5 P. C. 501, distinguishing the former case on the ground that there was no specific pledge of the bill of lading in question, but a general demand of all the security the debtor could give. These two decisions of the Judicial Committee

were from appeals from Hongkong arising out of the failure of the same firm.

(*s*) Defined in s. 2 (d) of the Indian Contract Act. It must be remembered, however, that “a pledge or promise of security for an existing debt is void unless there is some forbearance or undertaking by the creditor (such as not pressing for payment . . .) in return for it.” Pollock and Mulla, p. 182. But “where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security”; *Glegg v. Bromley* (1912) 3 K. B. 474, C. A., at p. 491, Parker, J.

(*t*) (1891) 18 Cal. 573, 590, 591; L. R. 18 I. A. 78. There was an appeal to the Privy Council, but no judgment on this point.

buyer endorses a bill of lading to his factor merely to enable the factor to obtain possession of the goods in his capacity of factor, in order that the factor may re-sell them on behalf of the buyer, the seller's right to stop in transit is not defeated, even though the insolvent buyer is indebted to the factor on general account (u).

Good faith.—Good faith in this context means absence of notice of such circumstances as render the bill of lading not fairly and honestly assignable, e.g., that the buyer is insolvent. Knowledge that the goods are still unpaid for does not constitute bad faith (v). The section assumes that the buyer is properly in possession of the bill of lading or other document of title. Cases in which he has obtained or retained possession of it fraudulently fall within section 30 (2), hence the second buyer must have no notice of that defect in the buyer's title. If he has no such notice, his position is the same as under this section. The burden of proof is upon the second buyer to prove that he acted in good faith and gave valuable consideration, and not on the seller to show that the second buyer did not act in good faith or gave no consideration (w).

The Bills of Lading Act IX of 1865, has not affected the law on these matters (x).

Other documents of title.—The proviso gives the same effect to other documents of title which at common law existed in the case of bills of lading only. In the case of a bill of lading, the authorities, from the nature of the case, relate to the seller's right to stop in transit; and as regards such documents as railway receipts, similar questions may now arise. Generally, however, dealings with these other documents of title will be of more importance as affecting the seller's lien.

Even at common law, if the seller issued to the buyer a document of title knowing that it was customary to pass it from hand to hand without notice to the seller and intending that it should be used for the purpose of sale or pledge, the seller lost his right to claim his lien against a second buyer who took the document for value and in good faith (y); and by the Act the seller who issues or transfers a document of title to the buyer is put into this position (z). The only condition is that the document should be

(u) *Patten v. Thompson* (1816) 5 M. & S. 350, 17 R. R. 350.

(v) *Cuming v. Brown* (1808) 9 East. 506, 9 R. R. 603; *Vertue v. Jewell* (1814) 4 Camp. 31.

(w) *Rash Behari Karari v. Narain Das Dorilal* (1922) 50 Cal. 399, 80 I. C. 485, (23) A. C. 182.

(x) See section 2 (4) and notes thereto.

(y) *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877) 5 Ch. Div. 205.

(z) *Ant. Jurgens Margarinefabriek v. Dreyfus* (1914) 3 K. B. 40. The

argument in that case that the corresponding section of the English Act (s. 47) did not apply because the document originated with the seller and was therefore not "transferred" by him to the buyer is excluded by the words of this section which, unlike the English section, contains the words "issued or lawfully transferred." The case also shows that there may be a document of title relating to unascertained goods; Cf. *Anglo-India Jute Mills v. Omademull* (1910) 38 Cal. 127, 10 I. C. 859.

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a document of title, that is, one which represents the goods, and not, *e.g.*, a mere engagement to deliver (a), and that the buyer should have lawfully obtained it from the seller, subject again, however, to the supplementary provisions of section 30 (2).

Recourse to other securities.—Sub-section (2) does not appear in the English Act, but it declares the law as laid down both in English and Indian cases, that the unpaid seller can call on a pledgee who has other security besides the goods comprised in the bill of lading, to resort to that security in relief of the goods in question, or the purchase money representing them (b).

54. (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.

Sale not generally
rescinded by lien or
stoppage in transit.

(2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

(3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

(a) See *Laurie and Morewood v. Dudin* (1925) 2 K. B. 383, where a delivery order received by the warehouseman without objection, but in no way acted upon, was held not to be

a document of title. See pp. 7, 10 *ante*.
(b) *Re Westzinthus* (1833) 5 B. & Ad. 817, 39 R. R. 665. See *Bapuji Sorabji v. The Clan Line Steamers* (1910) 34 Bom. 640, at p. 658 *et seq.* 7 I. C. 650.

Further rights of the unpaid seller against the goods.—The Act having dealt with the rights of an unpaid seller to retain possession of the goods or, if he has parted with the possession, to resume and thereafter to retain it, and defined the circumstances in which those rights may be exercised, in this section deals with his further rights and remedies, when in possession, against the goods. Whatever doubts may have at one time existed as to the effect of stoppage in transit, they have long been set at rest both in India and England by legislation ; as a result of which it is now clear in both countries that the effect of stoppage in transit is not to rescind the sale, but to replace the seller in the position of an unpaid seller who has not parted with the possession of the goods. His further rights against the goods are therefore the same in both cases and subject to the same limitations.

The provisions of this section also apply to the case of a person in a position analogous to that of a seller, such as a commission agent who is personally liable for the price (c).

Contract not rescinded by the buyer's default in payment.—It has already been seen that stipulations as to the time of payment are not of the essence of the contract (d), and it follows from this that default in payment at the due date does not of itself rescind or entitle the seller to rescind the contract, and this rule was well established at common law. The buyer therefore may put an end to the seller's lien and entitle himself to delivery by payment or tender of the price within a reasonable time (e).

Buyer's insolvency.—Even the buyer's insolvency does not operate, without more, as a rescission (f). It would be most unfair if it did, for the benefit of the contract vests in the official assignee and it may still be possible and proper to complete the contract for the benefit of the creditors (g). But conduct on the part of the insolvent and his trustee "which practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts" may amount to a refusal of performance entitling the seller to rescind under section 39 of the Indian Contract Act (h). If the seller does not elect, or is not entitled, to rescind, he has his remedy against the bankrupt buyer's estate for any damage suffered by the breach of contract (i).

(c) See section 45 (2) : *Harilal Chimani v. Pelhadrai & Co.* (1929) 31 Bom. L. R. 508, 120 I. C. 337, ('29) A. B. 260.

(d) Cf. section 11.

(e) *Martindale v. Smith* (1841) 1 Q. B. 389, 55 R. R. 285.

(f) Cf. sec. 38 and the notes thereto.

(g) *Ex parte Chalmers* (1873) L. R. 8 Ch. App. 289, 294; *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (1906) 34 Cal. 289.

(h) *Ex parte Chalmers*, *supra*, at pp. 293, 294, per Mellish, L.J. Rather slight evidence of the seller's intention to rescind is enough; *Morgan v. Bain* (1874) L. R. 10 C. P. 15, 27, per Brett, J.; *Jwan Vurjung v. Haji Osman Haji Oomar* (1903) 5 Bom. L. R. 373. See Pollock & Mulla, p. 261, *et seq.*

(i) *Boorman v. Nash* (1829) 9 B. & C. 145, 32 R. R. 607 and see note there.

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The seller is not entitled to treat the buyer as insolvent merely because he is in some temporary embarrassment. It must appear by his own admission or by other sufficient proof that he is unable to pay the price due in a reasonable time, and therefore does not expect or intend to pay it (*j*).

The seller's right to re-sell.—The unpaid seller, therefore, though in possession of the goods, has not the right merely because he is unpaid to resume a complete right of property, so as to divest totally the buyer's right of property in the goods (*k*). On the other hand it has always been recognized that his right is something more than a mere right to retain possession until he is paid, that is to say, it exceeds a mere lien, and is a right to interfere not only with the buyer's right of possession but also with his right of property in the goods. Writing of this right at a time when the law was not well settled, Lord Blackburn expressed the opinion that (*l*) "viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for the price, with a power of re-sale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the re-sale was conducted by the vendor in a fair and reasonable manner, the original purchaser who was in default would have no right to complain; if the re-sale produced a sum greater than the unpaid portion of the price, the purchaser would be entitled to the surplus; if there was a deficiency, he would still remain indebted to the vendor for that amount;" and added "the establishment of this principle would do very little violence to the decided cases, but it is not to be found laid down in any of them."

Perhaps it never was laid down in any case, but the Act to a very great extent adopts Lord Blackburn's suggestion, both in specifying the circumstances in which the seller may re-sell and in the method of dealing with the position when the re-sale is lawful and when it is improper.

Pakka adatia.—An agent who has made himself personally liable for the price of goods purchased for his principal, has the same rights to re-sell and of stoppage in transit as a vendor (*m*).

Lawful re-sale by the seller.—In providing that the seller may within a reasonable time sell perishable goods the Act follows the common

(*j*) *Re Phoenix Bessemer Steel Co.* (1876) 4 Ch. D. 108, C. A.

(*k*) Still less has he the right to do so by retaking them out of the buyer's possession after delivery. This is an actionable trespass and the buyer can recover the full value of the goods as damages, though it does not preclude the seller from suing, or counter-claiming,

for the price, for the tort of the seller does not rescind the contract; *Stephens v. Wilkinson* (1831) 2 B. & Ad. 320; *Gillard v. Brittan* (1841) 8 M. & W. 575; *Page v. Cowasjee Eduljee* (1866) L. R. 1 P. C. 127.

(*l*) Blackburn on Sale, p. 446.

(*m*) *Harpurshad v. Jindar Parshad* (1934) 15 Lah. 496, 150 I.C. 109, ('34) A.L. 191.

law (n) and by enacting that he may in any case re-sell after reasonable notice, if the buyer continues in default, it adopts the suggestion made by the Judicial Committee in 1866 (o). There is no definition of "perishable goods", though no doubt the phrase would include goods which are apt to deteriorate in a mercantile sense as well as those, such as fruit or fresh fish, which cannot be kept for long; and it has also been judicially suggested that goods are perishable if their price is liable to fall rapidly. "It is difficult to say what may be esteemed perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours" (p). It is not quite clear, however, that this meaning would be given to the word "perishable," but the suggestion is worthy of notice in view of the fact that the term "goods" in this Act includes such things as stocks and shares.

The fact that the buyer is liable to make good the difference between the contract price and the price realized on re-sale is a logical consequence of the rule that the original sale is not rescinded by the re-sale; and perhaps in enacting that if the re-sale results in a profit the buyer shall not be entitled to the surplus, the Act is slightly less logical than Lord Blackburn in suggesting that the surplus should belong to the buyer. "This point is not expressly dealt with by the English Act but it has been decided that in such a case the buyer is entitled to recover the surplus" (q).

The Act does not specifically deal with the position which may arise when the buyer has prepaid part of the price. Presumably, if the re-sale results in a loss, the seller must account for the amount already received from the buyer in reduction of his damages (r). But what if the contract price is Rs. 10,000 the buyer prepays Rs. 3,000 and the re-sale realizes Rs. 12,000 or Rs. 14,000? It does not seem unreasonable to suggest that "profit" means any surplus realized by the re-sale after giving credit for any amount prepaid by the buyer, and therefore the seller should in the first supposed case return Rs. 2,000 to the buyer and in the second the whole Rs. 3,000, but this is a matter which will require judicial decision.

Where a contract contains an arbitration clause and the seller expressly reserves a right of re-sale, on the buyer's default, the arbitration clause is not wiped out on the rescission of the contract by the seller re-selling under

(n) *Maclean v. Dunn* (1828) 4 Bing. 722, 29 R.R. 714.

(o) *Page v. Cowasjee Eduljee*, L. R. 1 P.C., at p. 145. Notice ought to be given also when the seller is claiming to re-sell under an express term in the contract. *Nathu Mal-Ram Das v. B. D. Ram Sarup & Co.* (1931) 12 Lah. 692, 701, 135 I. C. 778, ('32) A. L. 169.

(p) *Maclean v. Dunn*, *supra*, pp. 728, 729, per Best, C. J.

(q) *Gallacher v. Shilcock* (1949) 1 All. E.R. 921. Under the Indian Contract Act the buyer was held entitled to the surplus; *Pearey Lal Krishen Prasad v. Dev Karan Das* (1930) 125 I.C. 592, ('30) A.A. 886.

(r) See s. 5 note on earnest.

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the contract and a reference to arbitration can still be made. The rescission contemplated in sub-section (4) is something less than a complete annulment of the contract. As a claim for damages by the seller is saved, the contract exists, at least for that purpose (s).

Improper re-sale by the seller.—At common law if the seller re-sold without justification, even though the buyer was in default at the time of the sale, he was liable to be sued in an action of trover. The amount of damages recoverable by a successful plaintiff in that action normally was the full value of the goods. In this instance, however, the Courts determined that the buyer could only recover the value of the goods less the unpaid purchase price, that is, the actual loss that he had suffered (t).

Now that forms of action have been abolished it is unnecessary to have recourse to refinements of the rules which govern them, and there is therefore no difficulty in saying as a matter of substantive law that the buyer shall recover his actual loss and no more. If the re-sale results in a profit, the difference between the contract price and the price realized on re-sale will *prima facie* represent the buyer's loss, and he is fully compensated if he is entitled to recover the difference from the seller, which is what the Act enables him to do. If there is no difference between the contract price and the re-sale price the buyer will have suffered no loss, whereas if the re-sale realizes less than the contract price it is the seller and not the buyer who suffers loss, and justice is done by declaring that the seller shall bear that loss (u). In any case, if the buyer has prepaid any part of the purchase price, he will be able to recover it with interest under the provisions of section 61 (2).

Position of second buyer.—When the re-sale is lawful it stands to reason that the second buyer obtains a good title. His position is the same as that of one buying from a pledgee lawfully selling under his power of sale. Sub-section (3), however, provides further that, even if the re-sale is tortious on the part of the seller as against the first buyer, the second buyer obtains a good title. Even at common law he practically did so, for the first buyer being in default had not that immediate right to possession of the goods which was essential to enable him to maintain

(s) *Karam Narain v. Volkart Brothers* (1946) Lah. 692 (F.B.).

(t) This was the rule even if the re-sale was wholly tortious and the buyer was not in default at all, e.g., if the goods had been sold to him on credit; *Chinery v. Viall* (1860) 5 H. & N. 288, 120 R. R. 588; cf. *Bhimji N. Dalal v. Bombay Trust Corporation* (1930) 54 Bom. 381, 124 I.C. 800, ('30)

A.B. 306.

(u) It is conceived that the seller, if he re-sells improperly, cannot recover any damages at all, not even the difference between the market and contract price: though under s. 107 of the Indian Contract Act the result appears to have been different: *Sital Prasad v. Ranjit Singh* (1931) 29 All. L. J. 390, 136 I.C. 158, ('31) A.A. 583.

trover (*v*). Again, however, there is now no need to have recourse to the technical rules relating to the forms of action, and the second buyer will obtain a good title under the express provisions of sub-section (3), even if the seller was acting tortiously when he resold (*w*).

The sub-section, however, has no application when the first buyer is not in default; for instance, if before the re-sale he has duly tendered the purchase price. In such circumstances, the second buyer must rely upon the provisions of section 30, and will only obtain a good title as against the first buyer if he acted in good faith and without notice of the seller's defective title.

Right of re-sale does not bar other remedies.—It is conceived that the present sub-section does not, any more than did section 107 of the Indian Contract Act, which it replaces, deprive an unpaid seller of goods of any other remedy he may have; and therefore he is still at liberty to rescind the contract under section 55 of the Indian Contract Act, if it applies (*x*). "We are bound, I think, to determine questions of this kind so far as we can by reference to the Contract Act, and not to English law and sections 51-58 appear to contain general provisions which are applicable to all cases of reciprocal promises" (*y*). "No doubt section 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to re-sell" (*z*). Similarly where property in goods sold had passed to the purchaser, and after paying for and taking delivery of a part, he wrongfully declined to take delivery of the rest, and the undelivered portion was subsequently destroyed by fire, it was held, in a suit by the vendor for the balance of the purchase money, that though he might have sold the undelivered portion under this section after the defendant had refused to perform his contract, he was not bound to do so, and the omission to take that course did not affect his right to recover the balance sued for (*a*).

Re-sale clause in indents.—The question whether a seller of goods has the right of re-sale is important, for where he has such a right he is

(*v*) The law is different when one in possession of goods with a mere lien on them unlawfully sells them. A buyer from him acquires no title against the owner and is liable to be sued in trover for the full value of the goods. See *Mulliner v. Florence* (1878) 3 Q. B. D. 484, C.A. This marks the distinction between the seller's lien and an ordinary lien.

(*w*) In view of the very clear and complete provisions of this section it would be useless to refer to the older authorities in detail.

(*x*) *Buldeo Doss v. Howe* (1880) 6 Cal. 64; *Shankar Lal v. Jamna Das* (1938) 175 I.C. 440, ('38) A.L. 30. See also *Chandulal v. Grahams Trading Co.* (1941) 198 I.C. 17, ('41) A.L. 427.

(*y*) 6 Cal. 64, per Garth, C.J., at p. 68.

(*z*) *Ibid*, per Pontifex, J., at p. 69. See also *Buchanan v. Ardall* (1875) 15 B. L. R. 276, 292.

(*a*) *Ibid*. The law is the same in England on this point. See *Robinson, Fisher & Harding v. Behar* [1927] 1 B. K. 513.

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entitled to claim as damages the difference between the contract price and *the amount realized on the re-sale*, less the costs of the re-sale, while if he has no such rights he is entitled to the difference between the contract price and *the market price on the date of the breach*. Now the power to re-sell may be either statutory or it may be conferred on the seller by the terms of the contract of sale; in the former case it can be exercised only if the property in the goods has passed to the buyer, as is implied by the words of this section (b), in the latter case it can be exercised even if the property in the goods has not passed to the buyer. Thus, if it is provided in a contract of "indent" that on default on the part of the buyer to pay for and take delivery of the goods within a specified time, the seller should be at liberty to re-sell the goods, and that the buyer should pay all the loss arising on the contract with interest, the seller is entitled to re-sell the goods on default on the part of the buyer even if the property in the goods has not passed to the buyer, and to sue the buyer for the loss on re-sale (c), but it is necessary to the exercise of this power that the goods contracted for should at least have been appropriated for the purposes of the contract. If there has been no such appropriation, there is nothing to which the power of re-sale under the contract could attach, and the seller is not entitled in such a case to the loss on re-sale, but to the difference between the contract price and the market price at the date of the breach (d). It is, however, competent to the parties by an apt clause to provide for the exercise of the power of re-sale, even if no goods are appropriated to the contract (e). The provision of sub-section (4), that the exercise of an expressly reserved power of sale rescinds the contract is based upon English authority (f), but it must be remembered that re-sale, apart from any such convention, whether otherwise rightful or wrongful, does not.

It must be observed that the re-sale may be by auction, and if the seller buys in the goods at the auction the re-sale is still valid (g).

(b) *Clive Jute Mills Co. v. Ebrahim Arab* (1896) 24 Cal. 177; *Yule & Co. v. Mahomed Hossain* (1896) 24 Cal. 124; *Ishar Das-Dharam Chand v. Dhanpat Rai-Daulat Ram* (1927) 8 Lah. 514, 106 I. C. 59, ('27) A. L. 687; *Narsinggirji Manufacturing Co. v. Budansaheb Abdul-saheb Kaji* (1924) 26 Bom. L. R. 523, ('24) A. B. 390; *Asa Ram v. Kishan Chand* (1930) 120 I. C. 166, ('30) A. L. 386; *Girdhari Lal v. Schales & Adams Ltd.* ('37) A. L. 566; and see *Haridas v. Kalumull* (1903) 30 Cal. 649.

(c) *Moll Schutte & Co. v. Luchmi Chand* (1898) 25 Cal. 505, dissenting on this point from *Yule & Co. v. Mahomed Hossain* (1896) 24 Cal. 124; *Basdeo v. John Smidt* (1899) 22 All. 55, 65; *Best v. Haji Muhammad Saib* (1898) 23 Mad. 18;

Bubby Hurry & Co. v. M. Hertz & Co., Ltd. (1923) 4 Lah. 215, 222, 73 I. C. 421, ('23) A. L. 541.

(d) *Angullia & Co. v. Sassoon & Co.* (1912) 39 Cal. 568, at p. 581, 13 I. C. 705.

(e) *Ishar Das-Dharam Chand v. Dhanpat Rai-Daulat Ram* (1927) 8 Lah. 514, 106 I. C. 59, ('27) A. L. 687; *Rattan Lal Sultan Singh v. Tek Chand Chunni Lal* (1930) 120 I. C. 785, ('30) A. L. 379; *Sheo Narain v. New Sivan Sugar Co., Ltd.* (1938) A. L. J. 227, 175 I. C. 552, ('38) A. A. 272.

(f) *Lamond v. Davall* (1847) 9 Q. B. 1030, 72 R. R. 502.

(g) *Rattan Lal Sultan Singh v. Tek Chand Chunni Lal*, *supra*; *Nathu Mal Ram Das v. B. D. Ram Sarup & Co.* (1931) 12 Lah. 692, 135 I. C. 778, ('32) A. L. 169.

Reasonable time.—The provision as to reasonable time, which is a question of fact, must of course be observed. Thus it was held that a re-sale was not valid, where it was hurried on in an unusual manner and without proper advertisement (*h*). Again, if a seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer, as undue hardship might otherwise be caused to the buyer, for a seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen, and then re-sell the property and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach (*i*).

Buyer must be in default.—It is scarcely necessary to add that the buyer must be in default in order that the seller may claim damages against him on a re-sale, whether under the Act or the contract. If the buyer has lawfully rejected the goods, for instance, as not answering the description and the seller re-sells them at less than the contract price, he can recover nothing (*j*). It seems, too, that the onus is on the seller who re-sells to show that the goods in fact answered the description (*k*).

(*h*) *Buchanan v. Avdall* (1875) 15 B.L.R. 276.

(*i*) *Prag Narain v. Mul Chand* (1897) 19 All. 535; *Parthasarathy Chetty & Co. v. T. M. Gajapathy Naidu & Co.* (1925) 48 Mad. 787, 91 I.C. 568, ('25) A. M. 1258; *Coorla Mills v. Vallabhdas* (1925) 27 Bom. L. R. 1168, 94 I. C. 575, ('25) A. B. 547; *Harichand v. Gosho Kaisha* (1925) 49 Bom. 25, 86 I.C. 521, ('25) A. B.

28; *Nikku Mal-Sardari Mal v. Gur Parshad* (1931) 12 Lah. 452, 134 I.C. 777, ('31) A.L. 714.

(*j*) *Parthasarathy Chetty & Co. v. Gajapathy Naidu & Co.*, *supra*.

(*k*) *Ibid*; *Phul Chand-Fateh Chand v. Jugal Kishore-Gulab Singh* (1927) 8 Lah. 501, 106 I. C. 10, ('27) A. L. 693; cf. *Jackson v. Rotax Motor and Cycle Co.* (1910) 2 K. B. 937, at p. 945, C.A.

CHAPTER VI.

SUITS FOR BREACH OF THE CONTRACT.

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55. (1) Where under a contract of sale the property in

Suit for price. the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Examples :—The section may be illustrated by the following examples :

(1) Sale of butter to be shipped for London and to be paid for by bill at two months from the date of landing Goods in conformity with the contract are dispatched, but the ship is lost. The buyer is liable to pay the price, for the property in the goods passed to him on shipment, and the term relating to payment merely indicated the time at which payment was to be made, and the arrival of the goods is not a condition precedent to the liability to pay (*l*).

(2) Sale and delivery of goods on six months' credit. No action can be maintained for the price until the expiration of the six months, and the Statute of Limitation begins to run from that date (*m*).

(3) Sale of a quantity of iron, to be delivered between the 3rd March and 30th April, if the buyer so required : the price to be paid in any event on the latter date. By the 30th April a portion only had been delivered, as the buyer had not required delivery of more. The seller may recover the whole price, and he need not show that he has appropriated to the contract any specific iron to complete the delivery of the remainder (*n*).

(4) Sale of goods f.o.b. The seller sends them to the port of shipment, but the buyer does not nominate an effective ship, and the goods in consequence remain at the port. The seller cannot sue for the price, but can only maintain an action for damages (*o*).

(*l*) *Alexander v. Gardner* (1835) 1 Bing. N. C. 671, 41 R. R. 651.

(*m*) *Helps v. Winterbottom* (1831) 2 B. & Ad. 431, 36 R. R. 609.

(*n*) *Dunlop v. Groat* (1845) 2 C. & K. 153, 80 R. R. 834.

(*o*) *Colley v. Overseas Exporters* (1921) 3 K. B. 302.

(5) Sale of goods *c.i.f.*, payment by cash against documents on arrival of the steamer. The buyer refused to take up the documents. The seller cannot sue for the price, but only for damages for breach of contract (*p*).

Suit for the price.—Except as provided by sub-section (2), the seller can only sue for the price of the goods when the property has passed. "In former days an action for the price of goods would only lie upon one or other of two counts. First, upon the *indebitatus* count for goods sold and delivered, which was pleaded as follows: 'Money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant.' This count would not lie before delivery (*g*). The count was applicable where upon a sale of goods the property had passed and the goods had been delivered to the purchaser and the price was payable at the time of action brought. Secondly, upon the *indebitatus* count for goods bargained and sold, which was pleaded as follows: 'Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant.' This count was applicable where upon a sale of goods the property had passed to the purchaser and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price or a condition precedent to its payment. If the property had not passed the count would not lie: (*Atkinson v. Bell* (*r*)). In my view the law as to the circumstances under which an action will lie for the price of goods has not been changed by the Sale of Goods Act, 1893" (*s*).

The result is that if the passing of the property depends upon the fulfilment of some condition and that condition is not fulfilled, the seller cannot sue for the price, even if the non-fulfilment of the condition is due to the default of the buyer. In such a case the seller must bring an action for damages under the next section (*t*). On the other hand, if the property has passed and the payment of the price depends upon the fulfilment of some condition, and that condition is not fulfilled owing to the default of the buyer, then the seller may sue for the price, and that too even if by the terms of the contract the non-fulfilment of the condition reverts the property in the seller (*u*).

Where goods are sold for a particular amount, and part of that amount is to be paid for in cash and the remainder in kind, and if default is made

(*p*) *Stein Forbes & Co. v. County Tailoring Co.* (1916) 115 L.T. 215.

(*g*) *Boulter v. Arnott* (1833) 1 Cr. & M. 333.

(*r*) (1828) 8 B. & C. 277, 32 R. R. 382.

(*s*) *Colley v. Overseas Exporters*, *supra*, example (4), at pp. 309-10. McCardie, J.

(*t*) *Colley v. Overseas Exporters*, *supra*; *Mitchell Reid & Co. v. Buldeo Doss* (1887) 15 Cal. 1 (buyer refusing to take delivery); *Stein Forbes & Co. v. County Tailoring Co.*, *supra*, example (5).

(*u*) *Mackay v. Dick* (1881) 6 App. Cas. 302.

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to pay in kind, the vendor is entitled to sue for the remainder of the price (v).

The neglect of the buyer to pay must be wrongful, that is, he must be in default. Consequently if the sale be on credit, no action can be brought for the price until the period of credit has expired (w). If, therefore, a bill is given and accepted in payment of the price, the seller cannot sue for the price during the currency of the bill. If it be dishonoured on presentment, the seller may, if he has not in the meantime negotiated the bill away, sue either on the bill or for the price, but if he has negotiated the bill away, he cannot sue for the price as long as the bill is in the hands of the third party. In order to entitle him to sue for the price he must have taken up the bill himself before action brought (x).

Breach of agreement to pay by bill.—If by the contract the price is to be paid by a bill payable at a future day, and the buyer does not give the bill, the seller can only sue for the price when the bill if given would have matured; in the meantime he can only sue for damages for breach of the buyer's agreement (y). The same rule applies, at any rate if the contract be entire, if the price is payable partly in cash and partly by bill (z). Where, however, part of the goods are delivered and the buyer repudiates the contract, the seller may sue for the price of those actually delivered at once (a). On the other hand if the buyer owing to the seller's default refuses to give a bill, the seller cannot sue for the price of the goods actually delivered until the expiration of the time at which the bill would have matured (b).

As to the right of the seller to recover interest, see section 61.

Where the price is payable in a foreign currency, the exchange must be calculated at the rate in force at the time when the debt became due (c).

Price payable irrespective of delivery or passing of property.—Sub-section (2) embodies a rule which is of general application. "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed,

(v) *G. J. Dawson (Clapham), Ltd. v. H. & G. Duffield* (1936) 2 A. E. R. 232.

(w) *Helps v. Winterbottom*, *supra*, example (2).

(x) *Davis v. Reilly* (1898) 1 Q. B. 1; cf. *Belshaw v. Bush* (1851) 11 C. B. 191, 87 R. R. 639 (bill given by a third person and accepted by seller as conditional payment and endorsed away by him, and not taken up at the time of action brought for the price).

(y) The measure of damages is the

amount of the bill less discount at the time of action brought; *Gordon v. Whitehouse* (1856) 4 W. R. 231.

(z) *Paul v. Dod* (1846) 2 C. B. 800.

(a) *Bartholemew v. Markwick* (1864) 15 C. B. N. S. 711, 137 R. R. 729.

(b) *Waynes Merthyr Steam Coal Co. v. Morewood* (1877) 46 L. J. Q. B. 746.

(c) *Peyrae v. Wilkinson* (1924) 2 K. B. 166; *Madeleine Vionnet et Cie v. Wills* (1940) 1 K. B. 72.

an action may be brought for the money, or for not doing such other act *before* performance: for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent" (d).

Day certain.—It will be observed that the section requires that the price, or part of it, shall be payable, not only irrespective of delivery but on a day certain, "which means at a time specified in the contract not depending on a future or contingent event" (e). It is not clear, therefore, that this section is applicable to such a case as a contract for the sale of a ship to be built, the price being payable by instalments as and when the ship reaches certain stages of construction, but this is not a matter of great importance as such cases will, at all events, fall within section 38 (2) (f). Further, if goods are delivered under an agreement of sale, the price to be paid on certain days by instalments, the property in the goods to remain in the seller until the instalments are paid, with the right reserved to the seller to retake possession of the goods on the buyer's failure to pay an instalment, and the seller avails himself of that right, he cannot then sue for the unpaid instalments (g): and perhaps, in the absence of an express stipulation in the contract entitling him to retain all instalments actually paid, he may have to return these (h). His remedy is to sue for damages for breach of contract. He may, however, leave the goods in the possession of the buyer and sue for the instalments as they fall due: and apparently if the contract authorizes it, he may retake possession of the goods and exercise his lien upon them, in those cases in which the property has passed to the buyer, to secure the payment of unpaid instalments (i). In the latter case he is affirming the contract, in the former he is in effect putting an end to it.

(d) Notes to *Portage v. Cole*, 1 Wms. Saunders (ed. 1871), p. 551. In that case (which related to the conveyance of land) the money was payable "a week after the Feast of St. John the Baptist then next following," and it was held to be payable, although no conveyance or tender of a conveyance of the land had been made.

(e) *Shell-Mex, Ltd. v. Elton Cop Dyeing Co., Ltd.* (1928) 34 Com. Cas. 39, at p. 43, per Wright, J., citing *The Merchant Shipping Co. v. Armitage* (1873) L. R. 9 Q. B. 99 (a case relating to a lump sum freight under a charter party).

(f) See *Workman Clark & Co., Ltd. v. Lloyd Brazileño* (1908) 1 K. B. 968, C.A. The section will clearly apply if the instalments are payable on named days.

(g) *Attorney General v. Pritchard* (1928) 97 L. J. K. B. 561, 44 T. L. R. 490; *Hewison v. Ricketts* (1894) 71 L. T. 191.

Aliter, if the contract is not a contract of sale but of hiring. In that case he may sue for the unpaid instalments and keep those already paid. *Brooks v. Beirnsstein* (1909) 1 K. B. 98; *Abdul Quadeer v. Watson & Sons* (1930) 8 Rang. 236, 125 I. C. 361, ('30) A. R. 193, dissenting from *Maung Ba Oh v. Motor House Co.* (1929) 7 Rang. 431, 120 I. C. 132, ('29) A. R. 368.

(h) *Hewison v. Ricketts*, *supra*, per Collins, J. and cf. *The Auto Supply Co. v. Raghunatha Chetty* (1929) 52 Mad. 829, 121 I. C. 593, ('29) A. M. 884: but see *Workman Clark & Co., Ltd. v. Lloyd Brazileño*, *supra*, at p. 979.

(i) *Bhimji Dalal v. Bombay Trust Corporation* (1930) 54 Bom. 381, 124 I. C. 800, ('30) A. B. 306. (If an agreement in the form made in that case were made to-day, the property in the goods would not be held to have passed, so no question of a lien would arise).

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56. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

Damages for non-acceptance.

Suit for damages for breach of contract of sale.—Sections 56, 57, 59 and 60 of the Act declare the right of the seller and buyer respectively to sue for the recovery of damages on the other party's breach of contract: while section 61 (1) expressly saves the right of either to recover special damages where they are recoverable by law. The rules governing these matters are contained in section 73 of the Indian Contract Act, and are as applicable to contracts of sale as to all other contracts. Strictly, therefore, the place to discuss the question of damages is a commentary to that section: but it has been thought that it might be of convenience to the reader if it were dealt with here, in so far as it affects the contract of sale, although much that appears will also be found in the Commentary to section 73 of the Indian Contract Act.

Section 59 deals with the case of breach of conditions or warranties by the seller and must therefore be treated separately: but sections 56, 57 and 60 deal with the position which arises when either seller or buyer fails to perform his duty under the contract to give or take delivery of the goods, either by refusing to complete when the time for performance has arrived or by repudiating his obligations under the contract before that time. These cases have much in common, and the principles laid down in any case with reference to a seller's failure or refusal to deliver will generally be found to be equally applicable, *mutatis mutandis*, to the buyer's failure or refusal to accept. The principles which are common to both cases will, for the sake of convenience and to avoid repetition, be first considered.

General rule as to measure of damages (j).—As in all cases where a contract is broken, the injured party is entitled to receive from the party in default compensation for the loss or damage caused to him thereby which naturally arises in the usual course of things from such breach. In the case of a contract of sale it follows logically and obviously from this rule that "where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract

(j) The parties may themselves provide by the terms of the contract for the damages payable by either in the event of a breach. The case will then be governed by the provisions of section 74 of the Indian Contract Act, as to which

see Pollock and Mulla, p. 410 *et seq.* For English examples see *Diestal v. Stevenson* (1906) 2 K. B. 345; *Widnes Foundry (1925), Limited v. Cellulose Acetate Silk Co.* (1931) 2 K. B. 393, C. A. affirmed, (1933) A.C. 20.

to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them" (k). The above propositions are summarized by sections 50 and 51 of the English Act, which correspond to sections 56 and 57 of this Act, as follows :—

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50. (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.
51. (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

In substance, therefore, the provisions of the English Act are the same as those contained in section 73 of the Indian Contract Act and the illustrations thereto and, though the language is slightly different, both are declaratory of the common law (l). Section 73 has been held to apply to contracts for the sale of goods (m).

Available market.—It will be observed that sub-section (3) in each of the above sections of the English Act postulates an available

(k) *Barrow v. Arnaud* (1844) 8 Q. B. 595, 604, 609, 70 R. R. 568, Ex. Ch.

(l) *Jamal v. Moolla Darwood Sons & Co.* (1916) 1 A. C. 175, 43 I. A. 6, 11, 43

Cal. 493, 503, 31 I. C. 949.

(m) *Muniswami Chetty & Co. v. Muniswami Chetty & Co.* (1945) Mad. 180, (1944) A.M. 418.

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market, which means an available market at the place of delivery (n). In the case of commercial contracts there is usually such a market, such as the Cotton Exchange, Stock Exchange or Produce Markets. In other cases the market may be more limited, but the fact that the market is limited will not prevent the operation of the rule (o). Occasionally also there may be some difficulty in fixing the market price on any particular day. Evidence is then admissible from those engaged in the particular business and familiar with its incidents, even though they had not bought or sold anything on the day in question (p), and, although the prices made by "bulls" and "bears" are not to be taken as fixing the market price, the mere fact that the price is affected on the day in question by temporary scarcity, lack of demand or other like causes does not affect the question: the price on that day must still be taken to be the market price (q).

If there be no available market at the place of delivery, the market price at the nearest place, or the price prevailing in the controlling market, or the price at the final destination of the goods, may be taken into consideration (r). If delivery is to be made in a foreign country, the measure of damages is to be ascertained by reference to the market price of the goods at that place. The figure then has to be arrived at expressed in the currency of that country, which must then be translated into Indian currency, and the rate of exchange must be the rate prevailing at the date of the breach (s).

Date for ascertaining the damages.—The date at which the market price is to be ascertained is the day on which the contract ought to have been performed by delivery and acceptance as fixed by the contract or where no time is so fixed, at the time of the refusal to perform. The time, needless to say, need not be a definite date actually specified by the contract: in the case of a c.i.f. contract for instance the time is the time at which the documents will be forthcoming if forwarded with reasonable dispatch by the seller (t), or the contract may provide a certain period during which delivery is to be made, such as a named fortnight or month, and in such a case, in the event of a failure to deliver, the last day of such period is the

(n) As to the meaning of "market" see *Dunkirk Colliery Co. v. Lever* (1878) 9 Ch. D. 20, 25, C. A.

(o) *Marshall v. Nicoll* (1919) S. C. (H. L.) 129.

(p) *Shridhan Gopinath v. Gordhandas Gokuldas* (1901) 26 Bom. 235, 239. Pollock and Mulla, pp. 385-388, Benjamin on Sale, p. 999.

(q) *Josling v. Irvine* (1861) 6 H. & N. 512, 517; 123 R. R. 653.

(r) *Wertheim v. Chicoutimi Pulp Co.* (1911) A. C. 301 P. C.; cf. *Sharpe & Co.*

v. Nosawa & Co. (1917) 2 K. B. 814; (c.i.f. contract, market available on the spot, though not possible to buy the goods coming by a shipment in the particular month). Benjamin on Sale, p. 999.

(s) *Di Ferdinando v. Simon Smits & Co.* (1920) 3 K. B. 409, 414, 415, C. A.

(t) *Sharpe & Co. v. Nosawa & Co.*, *supra*; cf. *Steel Brothers, Ltd. v. Dayal Khatao & Co.* (1923) 47 Bom. 924, 87 I. C. 67, ('24) A. B. 247.

day on which the breach must be taken to have occurred and therefore the day on which to assess the damages (*u*); while if delivery is tendered at any time during that period and refused, the date of that refusal is the date of the breach. The time again may be uncertain, yet fixed by reference to the happening of an event, such as the arrival of a ship. In such a case the time is still fixed by the contract and the time at which the contract ought to have been performed is on the happening of that event (*v*).

It would appear, however, that when no time is mentioned and the contract therefore is to be performed within the indefinite period known as a reasonable time, the case must in India, at any rate, be treated as one in which no time is fixed, for that would appear to be the effect of illustrations (c) and (d) to section 73 of the Indian Contract Act. There is authority for this view in England also (*w*), but the question has been deliberately kept open by the Court of Appeal with the suggestion that the words "where no time is fixed" apply only to a case where the contract is to deliver goods "on demand" or "as required by the buyer" and do not include a case where the time for performance can be fixed by a jury, as it can be when performance is to be within a reasonable time (*x*). In India however, in cases where the contract is to be performed within a reasonable time, if either party before the expiration of that time and before anything has been done under the contract announces his intention of refusing to proceed with the contract, the day on which he so announces his intention must be taken as the time for assessing the damages, though even in India this rule can scarcely be applied in its entirety to cases where the contract is to be performed by delivering the goods in instalments. If before the expiration of the reasonable time either the buyer applies for delivery and the seller fails to deliver or the seller tenders delivery and the buyer fails to accept, such failure would, in either case, amount to a refusal to perform and the day for assessing the damages would be the day on which such refusal has occurred (*y*).

Extension of time.—By virtue of the provisions of sections 55 and 63 of the Indian Contract Act, where the time for performance is fixed by the contract but extended and another date substituted for it by the agreement of the parties, the substituted date must be taken as the date for ascertaining the measure of damages. An agreement to postpone performance for an unspecified time operates as an extension for a reasonable time, and

(*u*) *Mackertich v. Nobo Coomar Roy* (1903) 30 Cal. 477.

(*v*) *Melachrino v. Nickoll & Knight* (1920) 1 K. B. 693, 696.

(*w*) *Melachrino v. Nickoll & Knight*, *supra*, at p. 696, Bailhache, J.; *Millett v. van Heek & Co.* (1920) 3 K. B. 535, Bray and Sankey, J. J. See also *Ashmore &*

Sons v. C. S. Cox & Co. (1899) 1 Q. B. 443.

(*x*) *Millett v. van Heek & Co.* (1921) 2 K. B. 369, pp. 375, 376, 378. See further as to this case the note to sec. 60.

(*y*) See *Shriram Vithuram v. Trim-bak Amolakchand* (1927) 29 Bom. L. R. 1036, 103 I. C. 645, ('27) A. B. 514.

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consequently the date to be taken must then be a date at which there appears to be a failure or refusal to perform (z). The English Courts adopt the same rule where possible, but in England the question sometimes becomes complicated by the operation of the Statute of Frauds, and somewhat subtle distinctions have been drawn in the cases between variation of the contract and the waiver by one party of a stipulation in his favour (a). But if the time has not been postponed by agreement, the time fixed by the contract is still the date at which to ascertain the damages (b).

Although there may occasionally be difficulties as to ascertaining the date on which the damages are to be assessed, the rule still prevails that that date, when ascertained, fixes the measure of damages. Neither party, therefore, is affected by fluctuations in the rate of exchange (c), or again, if the buyer refuses to accept and the seller retains the goods, the buyer is neither responsible for any further loss should the market fall nor entitled to have the damages reduced if it rises (d). It follows equally from the premises that, if at the date of the breach the market price has moved in favour of the party not in default, he can recover no damages, or at the most nominal damages, which in England he is entitled to by reason only of the fact that the contract is broken, even though he has sustained no actual damage (e).

The above rules apply where the contract is to be performed by delivery by instalments (f), and also to those cases where one of the parties before the time for performance has arrived repudiates his obligations and the other party refuses, as he lawfully may, to accept that repudiation and elects to keep the contract alive (g).

(z) *Muhammad Habib Ullah v. Bird & Co.* (1921) 48 I. A. 175, 43 All. 257, 63 I. C. 589, ('22) A. P. C. 178; *Kidar Nath Behari Lal v. Shimbhu Nath-Nandu Mal* (1927) 8 Lah. 198, 99 I. C. 812, ('27) A. L. 176; *Coorla Mills v. Vallabhdas* (1925) 27 Bom. L. R. 1168, 94 I. C. 575, ('25) A. B. 547; *Ratilal Kothari v. Lakmichand* (1938) 178 I. C. 538, ('38) A. R. 364.
(a) See *Ogle v. Vane* (1868) L. R. 3 Q. B. 272, Ex. Ch.; *Hickman v. Haynes* (1875) L. R. 10 C. P. 598; *Levey v. Goldberg* (1922) 1 K. B. 688.

(b) *Muthaya Maniagarani v. Lekku Reddiar* (1912) 37 Mad. 412, 14 I. C. 255; *Narsinggirji Manufacturing Co. v. Budansaheb Abdulsahab Kaji* (1924) 26 Bom. L. R. 523, ('24) A. B. 390.

(c) *Barry v. Van den Hurk* (1920) 2 K. B. 709; *Di Ferdinando v. Simon Smits & Co.*, *supra*, note (g) the principle of which cases was approved by the H. of L. in *s.s. 'Celia' v. s.s. 'Vollturno'* (1921) 2 A. C. 544.

(d) *Jamal v. Moolla Dawood Sons & Co.* (1916) 1 A. C. 175, 43 I. A. 6, 43 Cal. 493, 31 I. C. 949, Collateral circumstances will not alter the rule; *Bolisetti Venkatanarayana v. Vekkiagaddalakshimal Punayya* (1928) 115 I. C. 342, ('28) A. M. 1232; *Firm Bachhraj Amolakchand v. Firm Khupchand Narsingdas* ('49) A. N. 199; cf. *Mehr Chand v. Jugal Kishore Gulab Singh* (1923) 6 Lah. L. J. 415, 85 I. C. 317; *Pollock and Mulla*, p. 385.

(e) *Shell-Mex, Ltd. v. Elton Cop. Dyeing Co.* (1928) 34 Com. Cas. 39 (seller suing); *Melachrin v. Nickoll & Knight* (1920) 1 K. B. 693 (buyer suing); *Shriram Vithuram v. Trimbak Amolakchand* (1927) 29 Bom. L. R. 1036, 103 I. C. 645, ('27) A. B. 514; (buyer suing. Framing the claim in trover makes no difference).

(f) It will be observed that the English Act refers to the "time or times" of performance.

(g) See as to this sec. 60.

The following examples may be given in illustration of the above remarks :—

(1) Contract in November for the sale of goods deliverable half in the last fortnight of February, half in the last fortnight of March following. The buyer became bankrupt in January. The goods were tendered on the 28th February and 31st March and not accepted. The bankruptcy of the buyer did not rescind the contract and the measure of damages was the difference between the contract and the market price on the 28th February and 31st March (*h*).

(2) Sale by merchants at Gloucester of a quantity of wheat deliverable at Birmingham as soon as vessels could be obtained. While the wheat was on its way the buyer intimated that he would not accept it. On arrival it was tendered to him and rejected. The time for ascertaining the damages for non-acceptance is the day on which the wheat was tendered (*i*).

(3) Sale of shares deliverable on 30th December. They were tendered on that date and rejected. The measure of damages is the difference between the contract value of the shares and their market value on that date. The fact that they were resold at an increased value subsequently is irrelevant (*j*).

(4) *A*, a stockbroker, closes the account of a client *B* prematurely and without instructions, instead of carrying it over to the next settlement as on the facts and the true construction of their agreement he ought to have done. *B* informs *A* that he insists on the performance of the contract. *A* cannot claim to have the damages assessed with reference to the price of the stock at the date of closing the account, but *B* is entitled to claim damages assessed according to the price at the date fixed for performance (*k*).

(5) Sale of goods, payment nett cash against documents in New York in dollars. The buyer failed to take delivery or pay for the goods. The damages must be assessed at the date of the breach and the sum payable must be converted into Indian currency according to the rate of exchange prevailing at that date (*l*).

(6) Sale in August of 500 tons of iron to be delivered in about equal proportions in September, October and November. Later in August the seller gave notice that he did not intend to deliver; the buyer demanded

(*h*) *Boorman v. Nash* (1829) 9 B. & C. 145, 32 R. R. 607; cf. *Cohen v. Cassim Nana* (1876) 1 Cal. 264.

(*i*) *Phillpotts v. Evans* (1839) 5 M. & W. 475; 52 R. R. 802.

(*j*) *Jamal v. Moolla Dawood Sons & Co.* (1916) 1 A. C. 175; *Mohan Bhasin Share Agency v. Khuda Bakhsh* (1939)

184 I. C. 43, ('39) A.L. 260.

(*k*) *Michael v. Hart & Co.* (1902) 1 K. B. 482, C. A. There was a suggestion that the damages might be fixed according to the highest price reached in the interval.

(*l*) *Barry v. Van den Hurk* (1920) 2 K. B. 709.

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delivery in October of 200 tons "as per contract" and on the 4th December bought against the seller: Held that the proper measure of damages was the difference between the market price and the contract price of one-third of 500 tons on the 30th September, 31st October and 30th November (*m*).

(7) Sale of a quantity of tallow to be delivered in all December. On the 1st October the seller announced that he would not deliver, but the buyer refused to accept his repudiation. The market price rose between the 1st October and 31st December: Held that the day for ascertaining the damages was the 31st December (*n*).

(8) Sale of 250 bales of Manilla hemp, shipment to be made from port or ports in the Philippine Islands by sailer or sailers between May 1st and July 31st. The sellers shipped hemp by a steamer in September, which would arrive at about the same date as a cargo shipped on a sailer between May and July, and on October 27th declared it against the contract. The buyers refused to accept the declaration and returned it, but on November 4th the sellers said that they could make no other. The date for assessing the damages was held to be November 4th (*o*).

Seller's right to sue for damages on buyer's breach of contract.—It has already been seen that the seller has various remedies both against the goods and the buyer personally, and in many cases where those remedies exist he still has the option of availing himself of the remedy declared by this section (*p*): but where the property has not passed and there is nothing in the contract which enables him to re-sell the goods and charge the buyer with the difference between the contract price and the price realized on the re-sale, or to sue for the price irrespective of delivery or the passing of the property, the remedy provided by this section is the only remedy by which he can recover pecuniary compensation for the buyer's breach of contract.

Measure of damages.—Where there is an available market for the goods, the problem in this instance is comparatively simple, for the seller is entitled to the difference between the contract and the market price. Theoretically, no doubt, it is his duty to get the best price that he can for the goods, but no case appears ever to have arisen where the seller has not been given the difference between the contract and the market price on the ground that he might have got a better price than the market price for the goods on the day in question, nor is such a position likely to arise.

(*m*) *Brown v. Muller* (1872) L. R. 7 Ex. 319; cf. *Cooverjee Bhoja v. Rajendra Nath* (1909) 36 Cal. 617, 2 I.C. 831; *Bilasiram Thakurdas v. Gubbay* (1915) 43 Cal. 305, 33 I.C. 23.

(*n*) *Leigh v. Paterson* (1818) 8 Taunt. 540, 20 R. R. 552; cf. *Mackertich v. Nobo Coomar Ray* (1903) 30 Cal. 477 (goods

deliverable August or September at the option of the seller).

(*o*) *Ashmore & Sons v. C. S. Cox & Co.* (1899) 1 Q. B. 436.

(*p*) See *Coorla Mills v. Vallabhdas* (1925) 27 Bom. L. R. 1168, 94 I. C. 575, ('25) A. B. 547, A.I.R. 1925 Bom. 547.

Questions of special damage, again, which cause difficulties when the buyer is plaintiff, can scarcely arise, for it is quite immaterial what price the seller himself paid for the goods or to what expense he put himself in order to have them ready to complete his contract (*q*).

The only cases which appear in practice to have occasioned difficulty are those in which the buyer has repudiated the contract before the time for performance has arrived and the seller has accepted the repudiation and rescinded the contract (*r*).

Questions, again, as to damages for late acceptance, very rarely at any rate, arise. Failure to accept at the due date may be treated by the seller as a breach of the contract and, in addition, where the property has passed, he has his remedies under section 44. Generally, if he consents to deliver the goods though the time for acceptance has passed he will not have suffered any actual damage and the delivery and acceptance would, in most cases at any rate, amount to an accord and satisfaction of his right of action for the breach of contract.

Damages where no available market.—Where the goods are not marketable there are difficulties in assessing the damages, but not by reason of the principle to be applied; the difficulty arises as to the method of applying it in the particular case. In some cases the price at which the seller actually re-sold the goods may furnish the correct measure of damages (*s*). In others the Court has to do its best to award such damages as will put the seller in the same position as he would have been in if the contract had been fulfilled (*t*). As, however, this must depend upon the particular facts of the case, such cases are merely illustrations of the general principle and are scarcely precedents for other cases where the facts are different.

57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

Buyer's right to sue for damages for seller's breach of contract.—When the property in the goods has passed, the buyer, provided that he is entitled to the immediate possession, has all the remedies of an

(*q*) *Whitaker, Ltd. v. Bowater, Ltd.* (1918) 35 T.L.R. 114, 115.

(*r*) As to this, see note to sec. 60.

(*s*) *Ryan v. Ridley* (1902) 8 Com. Cas. 105; *Maclean v. Dunn* (1828) 4 Bing. 722, 29 R. R. 714; *Dunkirk Colliery Co. v. Lever* (1870) 41 L. T. 633, C. A., 43 L. T. 706, H. L.

(*t*) *Re Vic Mill* (1913) 1 Ch. 183,

in C. A. (1913) 1 Ch. 465, (buyer failing to accept goods made to his order where the question was treated as being wholly on the facts); *Gear & Co. v. French Cigarette Paper Co., Ltd.* (1932) 13 Lah. 386, 135 I. C. 599, (31) A. L. 742 (the same, the damages awarded being the contract price); *Whitaker, Ltd. v. Bowater, Ltd.*, *supra*, note (*q*).

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owner against those that deal with the goods in a manner inconsistent with his rights. If, therefore, the seller wrongfully re-sells them, he may sue the seller in trover, and also the second buyer (*u*), though as against him the buyer's rights are seriously cut down by the provisions of sections 30 and 54.

As against the seller, however, he is not bound to sue in trover when the property has passed to him, and may proceed under this section : and in cases where the property has not passed, it is his only remedy except in the comparatively rare cases in which he can enforce specific performance under section 58. It is the remedy not only when the seller makes no delivery at all, but also when in pretended performance of the contract he tenders delivery of goods which the buyer lawfully rejects

The rule as to the market price, perhaps, is not always quite so satisfactory as it is in the case of the buyer's refusal to accept, and produces hardship in individual cases (*v*), but owing to its convenience it is the one adopted.

Price pre-paid.—It would appear also that, even if the buyer has pre-paid the price, the date for ascertaining the measure of damages must be the date of the breach, though it might be said that in such a case the buyer has not got the money in his hands and cannot therefore go into the market and buy : and in conformity with this idea it has been ruled at *nisi prius* that the date ought then to be the date of the trial (*w*). The better view, however, appears to be that even so the date to be taken is the date of the breach, and in addition to recovering the difference between the market and contract price on that date, the buyer may also recover the price pre-paid with interest (*x*).

Goods not obtainable in the market.—If the subject matter of the contract is not obtainable in the market, the damages must be measured

(*u*) See *Langton v. Higgins* (1859) 4 H. & N. 402, 118 R. R. 515.

(*v*) *Brady v. Oastler* (1864) 3 H. & C. 112, 140 R. R. 338, where the price was increased in consideration of early delivery. On the other hand the fact that the buyer sustains no actual loss from the seller's failure to deliver is no ground for awarding him merely nominal damages. Cf. illustration (a) to s. 73 of the Indian Contract Act, under which he is entitled to recover the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have been delivered; *Hajee Iemal & Sons v. Wilson & Co.* (1918) 41 Mad. 709, 45 I. C. 942. Pollock and Mulla, p. 386.

(*w*) *Elliot v. Hughes* (1863) 3 F. & F. 387, per Byles, J., adopting the analogy

in actions for the non-replacement of stock; *Shepherd v. Johnson* (1802) 2 East. 211.

(*x*) Chalmers, p. 126; *Startup v. Cortazzi* (1835) 2 C. M. & R. 165, 41 R. R. 710. In that case the Court definitely ruled that the date was the date on which the delivery ought to have been made, and not the date of the trial. This was a very material point, for on the former date the market price had not risen, while on the latter it had. It was therefore held that the buyer could recover nothing more than the purchase price which he had pre-paid with interest, which the defendant had paid into court; *Rameshwardas v. Paper Sales Ltd.* (1943) 45 Bom. L. R. 906, ('44) A. B. 21. As to the buyer's right to recover interest see s. 61.

by the difference between the contract price and the price which actually has to be paid by the buyer for the best and nearest available substitute (y). Where no such substitute is available, then, if there has been a contract to re-sell the goods, the price at which that contract was made will be evidence of their value, and the buyer can recover the difference between that price and the price at which he bought them from the defaulting seller. If there has been no such contract, the market value may be estimated by adding to the price of the goods at the place where they were purchased the costs and charges of getting them to their place of destination and the usual importer's profits (z). When on the breach of a contract for sale of goods, the goods cannot be replaced in the market, the proper measure of damages is the profit which the purchaser would have made if the contract had been carried out (a).

Delay in delivery.—In this case again the rule is that *prima facie* the damage is the difference between “the value of the article contracted for at the time when it ought to have been delivered and the time when it actually was delivered” (b). The market rate, however, in this case is only a presumptive test: “it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed,” and the rule as to market price “is intended to secure only an indemnity” to the purchaser. “The market value is taken because it is presumed to be the true value of the goods to the purchaser.” If he does not get his goods he “should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact

(y) *Hinde v. Liddell* (1875) L. R. 10 Q. B. 265, 269; *Elbinger Actien Gesellschaft v. Armstrong* (1874) L. R. 9 Q. B. 473, 476.

(z) *Borries v. Hutchinson* (1865) 18 C. B. N. S. 445, 144 R. R. 563; *O'Hanlan v. G. W. Ry. Co.* (1865) 6 B. & S. 484, 141 R. R. 482; *Cooverjee Bhoja v. Rajendra Nath* (1909) 36 Cal. 617, 2 I. C. 831; *Hajee Ismail & Sons v. Wilson & Co.* (1918) 41 Mad. 709, 715, 45 I. C. 942. *Pollock and Mulla*, pp. 385-386. Compare *Jagmohandas v. Nusserwanji* (1902) 26 Bom. 744. *Pollock and Mulla*, p. 387; *Patrick v. Russo-British Grain Export Co.* (1927) 2 K. B. 535. (Purchaser

to the knowledge of the seller bought the goods with a view to re-sale); *Household Machines Ltd. v. Cosmos Exporters Ltd.*, 2 All. E.R. 622. The amount of damages recoverable ultimately depends upon whether the party aggrieved has acted reasonably in mitigating the damages. *Lester's Leather & Skin Co. v. Home & Overseas Brokers* (1948) 64 T. L. R. 569. (a) *Leavey & Co., Ltd. v. George H. Hirst & Co., Ltd.* (1944) 1 K. B. 24. (b) *Elbinger Actien Gesellschaft v. Armstrong*, *supra*, note (y), at p. 477. Cf. Illustration (g) to s. 73 of the Indian Contract Act. *Pollock and Mulla*, p. 388.

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the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position" (c).

Sub-contracts of buyer usually ignored.—This rule, however, must be taken as only applying to cases of late delivery. "When there is no delivery of the goods the position is quite a different one. The buyer never gets them, and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day—and barring special circumstances, the defaulting seller is neither mulct in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price (*Great Western Railway Co. v. Redmayne*) (d), nor can he take benefit of the fact that the buyer has made a forward re-sale at under the market price" (e).

"As a general rule, sub-contracts entered into by a buyer cannot be used to increase or minimize his damages, as the sub-contracts are incidental matters with which the seller had nothing to do. I find that laid down in *Rodocanachi v. Milburn* (f), which was affirmed in *Williams Bros. v. Agius* (e) This Court in *Slater v. Hoyle and Smith* (g) applied the same principle, that unless the seller contemplates the possibility of a sub-contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages. This was one of the many instances in English law where the measure of damages did not give the real loss suffered by the party" (h). Nor is the general rule excluded by reason only of the fact that the seller knows generally that the buyer requires the goods for re-sale (i). In order that the buyer may recover as damages an amount in excess of that which represents the difference between the market price and the contract price, it is necessary to prove facts which will bring

(c) *Wertheim v. Chicoutimi Pulp Co.* (1911) A. C. 301, 307, 308, P. C. Pollock and Mulla, p. 386.

(d) (1865) L. R. 1 C. P. 329.

(e) *Williams Bros. v. Ed. T. Agius, Ltd.* (1914) A.C. 510, 522-523, per Lord Dunedin; cf. *Muhammad Habib Ullah v. Bird & Co.* (1921) L. R. 48 I. A. 175, 43 All. 257, 63 I. C. 589, ('22) A. P.C. 178.

(f) (1887) 18 Q. B. D. 67 at pp. 77, 80, C. A.

(g) (1920) 2 K. B. 11 (breach of warranty).

(h) *Finlay & Co. v. Kwik Hoo Tong Handel Maatschappij* (1929) 1 K. B. 400, C. A., at p. 411. Scrutton, L. J.

(i) *Thol v. Henderson* (1881) 8 Q. B. D. 457.

the case within the second branch of section 73 of the Indian Contract Act. This is discussed in the notes to section 61, and the cases where such further damages have been awarded will be found set out there.

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58. Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

Examples.—The section may be illustrated by the following examples :—

(1) Contract to sell a ship to a German shipowner. The ship was an old ship but her engines and boilers were new and such as to satisfy the German regulations, and the buyer could have her registered immediately in Germany. In view of these facts and the price, the ship was of peculiar value to the buyer, and there was only one other ship on the market which would suit his requirements. The Court granted specific performance of the contract (*j*).

(2) Sale of the timber on the seller's land, the buyers to cut it and have leave to saw it up on the seller's land. After a certain amount had been cut the seller repudiated the contract and forcibly prevented the buyers from cutting or removing any more. The Court gave the buyers relief by way of specific performance and granted an injunction against the seller, restraining him from further interfering with the buyers (*k*).

(3) Sale on November 1st of 500 tons of white western wheat, c. i. f. Bristol, being part of a cargo of 1,000 tons already bought c. i. f. by the seller, to be shipped by a named ship between certain dates, payment cash against invoice. The 1,000 tons were shipped and a bill of lading arrived therefor, which the seller received on January 4th. On January 5th he sent a provisional invoice, and on February 2nd a confirmatory invoice to the buyers, who paid the price, less the freight, by cheque on February 5th.

(*j*) *Behnke v. Bede Shipping Co.* (1927) 1 K. B. 649. | (*k*) *James Jones & Sons, Ltd. v. Earl of Tankerville* (1909) 2 Ch. 440.

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The seller, who had deposited the bill of lading with his bank, paid this cheque into his account with the bank. On February 24th he was adjudicated bankrupt. On February 26th the buyers sent the trustee a cheque for the amount of the freight on 500 tons, but he returned it. On February 28th the ship arrived. Partly with the aid of the proceeds of the buyers' cheque for the price, the trustee was able to obtain the bill of lading from the bank and so obtained possession of the cargo. He refused to deliver 500 tons or any part of the cargo to the buyers. The Court held that the goods were neither specific nor ascertained, that the buyers were not entitled to specific performance or any other form of equitable relief, and could only prove against the seller's estate for damages (*l*).

History of the section.—This section reproduces, with necessary modifications, section 52 of the English Act.

Originally the power to order the specific delivery of chattels was exercised by the courts of equity, the remedy at law being imperfect : for in an action of trover damages only could be awarded, and in detinue the defendant could retain the chattel sued for upon payment of the value as assessed by the jury. Section 78 of the Common Law Procedure Act, 1854, gave the common law courts power to enforce specific delivery of the chattel on the application of the plaintiff in an action of detinue : and by section 2 of the Mercantile Law Amendment Act, 1856, a like power was given to those courts in respect of a contract to deliver specific goods for a price in money. This last enactment is repealed, and is replaced by section 52 of the English Act. The object therefore of the legislation was not to change the law, but to remedy defects in procedure which existed in the courts of common law (*m*).

Scope of the section.—The section provides a remedy for the buyer, and gives no correlative right to the seller : it is therefore only on the application of the buyer, when suing as plaintiff, that the contract of sale can be enforced specifically : and the section only applies when the contract is to deliver specific or ascertained goods (*n*). "Specific" has the meaning which is given in the definition clause, while "ascertained" means "identified in accordance with the agreement after the time a

(*l*) *In re Wait* (1927) 1 Ch. 606, C. A., *dissentiente* Sargant, L. J. This case was started by a motion in the County Court. By the provisions of the English Bankruptcy Acts, when a bankruptcy case is started in the County Court the ultimate court of appeal is the Court of Appeal, and no appeal lies from it to the House of Lords, even with leave. The case, therefore, could not be taken to the House of Lords which, in view of the very strong judgment of Sargant,

L. J., was unfortunate. The opinion of the majority of the Court, however, must be treated as conclusively binding by a commentator, and the notes to this section are largely founded upon that opinion.

(*m*) *In re Wait, supra*, example (3), at pp. 616, 617, per Lord Hanworth, M.R.

(*n*) *In re Wait, supra*; *Thames Sack Co. v. Knowles & Co.* (1918) 88 L. J. K. B. 585.

contract sale is made " (o). Nor can the history of the section be ignored. The courts of equity only exercised their jurisdiction when the chattel in question was of some peculiar value, and would not interfere where the goods were articles of commerce, readily obtainable in the market, considering that the plaintiff had sufficient remedy in those cases in an action for damages at law, and it was not the object of the section to alter this rule. In substance, the present section gives effect to these considerations by making the power of the Court to decree specific delivery of the chattel in any case subject to the provisions of Chapter II of the Specific Relief Act, 1877, according to which the remedy of specific relief may be granted when compensation in money would not afford the buyer adequate relief for the loss of the goods or when it would be extremely difficult to ascertain the actual damage caused by their loss (p). In ordinary commercial contracts neither of these conditions is usually fulfilled, and, indeed, the statutory presumption is that the breach of a contract to transfer moveable property can be adequately relieved by pecuniary compensation (q). The mere fact, moreover, that the buyer may have paid the contract price in advance, and that the seller has subsequently gone bankrupt, does not bring the case within the section. The buyer who gives credit to the seller is in no better position than the seller who gives credit to the buyer (r).

The cases, therefore, in which the buyer can rely on this section are limited. He will not be prejudiced by the fact that the property has not passed, for the section applies even in that case (s): but even if the property has passed, so that he could bring the common law action of detinue, he must still show that it is a case where damages are not an adequate remedy (t).

The Act not concerned with equitable rights.—This section is the only one in the Act which deals with what may be called equitable rights: and in view of the fact that the Act so carefully deals with the rights and obligations of the seller and buyer under the contract of sale, it would seem that its provisions are complete and exclusive statements of the legal relations both in law and equity. "They have, of course, no relevance when one is considering rights, legal or equitable, which may come into existence dehors the contract for sale. A seller or a purchaser may, of course, create any equity he pleases by way of charge, equitable

(o) *In re Wait*, *supra*, at p. 630, per Atkin, L.J., cf. section 19. Sargant, L.J., however, was of opinion that "specific goods" in this section could include a parcel of a specific whole. See notes to s. 8.

(p) Specific Relief Act, s. 11.

(q) *Ib.*, s. 12, Explanation. See

Pollock and Mulla, pp. 667-668.

(r) *In re Wait*, *supra*.

(s) *In re Wait*, *supra*, at p. 617; *Jones & Sons v. Earl of Tankerville* (1909), *supra*, example (2), at p. 445.

(t) *Whiteley & Co. v. Hilt* (1918) 2 K. B. 808, at p. 818. C.A.; *Cohen v. Roche* (1927) 1 K. B. 169.

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assignment or any other dealing with or disposition of goods, the subject-matter of sale; and he may, of course, create such an equity as one of the terms expressed in the contract of sale. But the mere sale or agreement to sell, or the acts in pursuance of such a contract mentioned in the Code, will only produce the legal effects which the Code states " (u). The doctrines, therefore, of equitable assignments, liens and charges will not have any place in the law relating to the sale of goods as such: for it "would have been futile in a Code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive and coming into existence earlier than the rights so carefully set out in the various sections of the Code" (v).

59. (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may—

Remedy for
breach of warranty.

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
- (b) sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

Remedies for breach of warranty.—The definition of warranty is contained in section 12, from which it appears that a breach of it gives rise to a claim for damages only on the part of the buyer. It is also laid down by section 13 that, even in the case of a breach of condition, if the buyer has accepted the goods or, in the case of entire contracts, part of them, either voluntarily, or by acting in such a way as to preclude himself from exercising his right to reject them, he must fall back upon his claim for damages as if the breach of the condition was a breach of warranty.

This section declares the methods by which a buyer who has a claim for damages in either case may avail himself of it, and is confined to those

(u) *In re Wait, supra*, at p. 636, per Atkin, L. J. | (v) *Ib.*, at pp. 635-6.

cases (w). The section is declaratory of the common law. The effect of it is that the buyer may rely on the breach as against the seller suing for the price, and may set off his damages, as far as they go, against the price (x). If the damages exceed the amount of the price he may either counterclaim for the excess, or bring an independent action in respect of it: or he may, in all cases, pay the price and bring a distinct action for any damage sustained by reason of the seller's breach (y).

Measure of damages.—Again, section 73 of the Indian Contract Act is the section which governs this question, so the Act omits laying down any rules as to ascertaining the damages. The corresponding section in the English Act (z) contains the following sub-sections on this point which are, however, declaratory of the common law :—

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty. See *Bunting v. Tory* 64 T.L.R. 353.

Warranty of quality.—In the case of a warranty of quality the *prima facie* presumption is that the measure of damages is the difference between what the goods are intrinsically worth at the time of delivery, and what they would have been worth, if they had been according to contract, and this must be ascertained by reference to the market price at that time, whether it has fallen or risen since the date of the contract (a). The contract price, or the special value of the goods to the buyer, is an irrelevant consideration, consequently sub-contracts of which the seller had no notice must be disregarded whether for the purpose of increasing

(w) It does not deal with cases of fraudulent misrepresentation, which may enable the buyer to set aside the contract or cases where by the express terms of the contract the buyer may return the goods in case of a breach of warranty. Again, where the buyer has lawfully rejected the goods, he must proceed under s. 57, and, if necessary, under s. 61, to recover the purchase price and interest.

(x) *Mondel v. Steel* (1841) 8 M. & W. 858, 58 R. R. 890; *Poulton v. Lattimore* (1829) 9 B. & C. 259, 32 R. R. 673 (extinction of price).

(y) *Davis v. Hedges* (1871) L. R. 6 Q. B. 687.

(z) Section 53, sub-section (1) is

reproduced by sub-section (1) of this section and sub-section (4) by sub-section (2).

(a) *Dingle v. Hare* (1859) 7 C. B. N. S. 145, 121 R. R. 424; *Jones v. Just* (1868) L. R. 3 Q. B. 197 (where the market price had risen to such an extent that the inferior article (hemp) was worth nearly as much as the contract price of the original article. In this case the hemp was damaged by sea water and was therefore not of merchantable quality, but it will be remembered that "quality" includes the state and condition of the goods; s. 2 (12)) *Loder v. Kekulé* (1857) 3 C. B. N. S. 128, 139-140, 111 R. R. 575.

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or diminishing the damages (b). But though the date of delivery is usually the date at which the difference between the two values is to be fixed, circumstances may exist which render it necessary to take a later date, as when, owing to the conduct of the seller, the buyer refrains from disposing of the inferior goods immediately (c). Moreover, as in the case of non-delivery, there may be no available market, and then perhaps the measure of damages may be the difference in the value of the goods to the plaintiff, as evidenced by the price at which he had agreed to re-sell them, and their actual value (d).

Other warranties.—As regards other warranties, such as warranties as to the soundness of animals, the measure of damages for the breach must be governed by the general rule, which is declared by section 53, sub-section (2) of the English Act in the same language as is used in section 73 of the Indian Contract Act. So where a farmer bought a cow warranted to be free from foot and mouth disease, though in fact she was suffering from that disease, and placed her among other cows of his, with the result that both the cow and others which she infected died of the disease, he was held entitled to recover the whole of his loss, and not merely the value of the cow which he bought (e).

Breaches of conditions.—In the majority of cases, however, in which the buyer sues for damages for breach of warranty, it will be found that the warranty in question is not a warranty properly so called but a condition, particularly the condition that the goods should correspond with the description by which they were sold, or should be fit for a particular purpose (f). A written condition in an auction sale which protected the seller may be over-ridden by a verbal warranty before the auction and damages may be recovered for breach of the warranty (g).

Goods not answering to the description.—When the buyer is treating the breach of condition that the goods should correspond with the description as a breach of warranty, the damages for such breach of

(b) *Loder v. Kekulé*, *supra*; *Slater v. Hogleand Smith* (1920) 2 K. B. 11, C.A.

(c) *Loder v. Kekulé* (1857) 3 C. B. N. S. 128, 111 R. R. 575. See also *Ashworth v. Wells* (1898) 78 L. T. 136, C. A., where an orchid was sold warranted as a white orchid for £20: but when it flowered two years later it turned out to be a common purple orchid of no value. A white orchid was worth at least £50, but before it flowered buyers would not be willing to give more than £20 for it. It was held by the Court of Appeal that in these circumstances the date to be considered was the date at which it flowered, and not the date at

which it was delivered, and the damages were £50, not £20.

(d) Benjamin on Sale, p. 1045, citing the Irish case of *Hamilton v. Magill* (1883) 12 L. R. Ir. 186. In that case, however, the seller knew of the sub-sale.

(e) *Smith v. Green* (1875) 1 C.P.D. 92; cf. *Mullett v. Mason* (1865) L. R. 1 C. P. 559 (a case of a fraudulent warranty, but it makes no difference when the warranty is false whether it is false to the knowledge of the seller or not. Pollock and Mulla, p. 393).

(f) For the sake of convenience these conditions are called warranties in this note.

(g) *Couchman v. Hill*, 1 All. E. R. 103.

warranty are different from the damages which follow from a mere breach of warranty of quality, and are governed by the general rule laid down alike in section 53 (2) of the English Act and section 73 of the Indian Contract Act, and not by the more limited rule laid down in section 53 (3) of the English Act, that is, the damages must flow naturally from the breach (*h*). "For the purpose of rendering a defendant responsible for damages which, in the ordinary course of things flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties.....If those consequences result solely from the act in question and an usual state of things, they are the ordinary and usual consequences of that act, and the defendant is liable" (*i*).

Accordingly, both before and after the passing of the English Act, where seed was sold as seed of a particular description, and the buyer re-sold it to growers, and the seed turned out to be seed of a different description producing inferior crops, with the result that the buyer became liable in damages to his sub-purchasers, the buyer has been held entitled to recover those damages from the seller, and it is not material whether the seller had notice that the buyer intended to re-sell or not (*j*). On the other hand, in such cases, when the buyer has ordered the goods for a purpose which is not expressly or by implication communicated to the seller, he cannot add to his damages any additional sum for loss sustained owing to the goods not being fit for that purpose (*k*).

Accordingly when the plaintiffs bought by description certain sulphuric acid which, according to the description, ought to have been commercially free from arsenic but in fact was not, and used the acid for the purpose of manufacturing glucose, it was held that they were entitled to recover the price of the acid, which was useless to them, and also damages representing the value of the materials used for the purpose

(*h*) *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.* (1904) 1 K. B. 725, 734-5.

(*i*) *Wilson v. Dunville* (1879) 6 L. R. Ir. 210, 217, quoted with approval in *Bostock v. Nicholson, supra*, at p. 738. In the former case the defendants sold a quantity of grains warranted to be "distillers' grains," ordinarily used for feeding cattle. In the particular case they were mixed with lead and the plaintiff's cattle who ate the grains were consequently poisoned. It was found by the jury that the grains sold did not reasonably correspond with the description "distillers' grains" and the defendants were held liable for the poisoning of the plaintiff's cattle.

(*j*) *Randall v. Raper* (1858) E. B. & E. 85, 113 R. R. 554; *Wallis v. Pratt* (1911) A. C. 394. In the former case there was also the allegation that the seed in question was expressly warranted as "chevalier seed barley," but in substance, the seed was sold as chevalier seed barley, and at the present time, now that the distinction between conditions and warranties is clearly established, such a case would certainly be treated as a sale of goods by description, and the breach would be a breach of the warranty that the goods should correspond with the description. *Nicholson v. Smith Marriott* (1947) 177 L. T. 189.

(*k*) *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.* (1904) 1 K. B. 725.

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of making glucose, which had been spoilt by being mixed with the acid. The plaintiffs, however, sold the glucose to brewers, who in turn used it for the manufacture of beer, with the result that many people who drank the beer were poisoned by the arsenic: and the plaintiffs consequently were under liability to the brewers to whom they had sold the glucose, and further, in consequence of these transactions, had been compelled to stop business. It was held, however, that damages could not be recovered under either of these heads as being too remote (*l*); though the result might have been different if they had actually sold the acid, instead of glucose made from it, to the brewers, or had made it known to the defendants that they required the acid for the purpose of making glucose for sale to brewers, for in the latter case they might have established a breach of warranty within section 16 (*l*) (*m*).

Goods not fit for the purpose for which they were sold.—

Where there is a breach of the warranty that the goods should be fit for a particular purpose, the rule again is the same, that the damages should be such as naturally flow from the breach. So where the plaintiff bought a carriage pole for his carriage from the defendant who was a coach builder, and, while the plaintiff was driving, the pole, owing to a latent defect, broke and the horses became restive and were injured, it was held by the Court of Appeal that the plaintiff might recover not only the value of the pole, but also damages for the injury to the horses if the jury should find that such injury was the natural consequence of the defect in the pole (*n*). And where the plaintiff's wife died from the effects of eating tinned salmon which the plaintiff bought from the defendant, the plaintiff was held entitled to recover, as damages for the breach of the warranty that the salmon should be fit for human food, the expenses for medical attendance on his wife, her funeral expenses and a sum to compensate him for the loss of his wife's services (*o*).

In the case where the buyer, having bought goods as fit for a particular purpose, re-sells them with the same warranty, and owing to their not being fit for that purpose, has to pay damages to his buyer, the position is somewhat peculiar. It would appear, at first sight, that such damages flow as naturally from the breach of this warranty as they flow from the breach of the warranty that the goods correspond with the description, and, therefore, it is immaterial whether the original seller knew or contemplated that the buyer intended to re-sell the goods. But in all

(*l*) *Bostock & Co., Ltd. v. Nicholson & Sons, Ltd.*, *supra*.

(*m*) For a case where damages for loss of goodwill were held recoverable see *Cointat v. Myham & Son* (1913) 2 K. B. 220. That case, however, went to the Court of Appeal, who ordered a new

trial, in order that the question of custom excluding any implied condition might be left to the jury. See 110 L. T. 749.

(*n*) *Randall v. Newson* (1877) 2 Q.B.D. 102, C.A.

(*o*) *Jackson v. Watson & Sons* (1909) 2 K. B. 193, C.A.

the cases—and they are numerous—in which the buyer has succeeded in recovering such damages, the Courts appear to have stressed the fact that the re-sale by the buyer was within the contemplation of the parties to the original sale. From this it would appear that in this instance it is considered that the case falls within the second and not the first rule laid down in section 73 of the Indian Contract Act. Certainly the case of *Hammond v. Bussey* (p) was argued and dealt with on that assumption. There the contract was for the sale of steam coal fit to be used in steamers, and the seller knew that the buyer required it for the purpose of re-selling it as such to steamers at Dover. The coal was not fit for that purpose and the buyer had to pay damages to his sub-buyer in consequence. There is no doubt that in fact the case could be classified with those where the parties knew that the likely result of the breach by the seller of the warranty would be that the buyer would have to pay damages to his sub-buyer. The defendants indeed admitted this and paid those damages into Court, and the only issue was whether the buyer could, in addition, recover the costs incurred by him in defending the action brought against him by the sub-buyer, in which those damages were awarded. It was held that he could, for, as he acted reasonably, the incurring of such costs must be taken to have been as much in the contemplation of the parties as the liability to pay the damages likely to be the result of the breach. Subsequent cases have all been based upon *Hammond v. Bussey* (q) and the finding that the sub-sale was to be taken as in the contemplation of the parties exists in all cases where the buyer has been held entitled to recover damages which he has become liable to pay to sub-purchasers. There is, however, no authority, as far as can be ascertained, in which it is expressly laid down that in such cases, as contrasted with cases in which the seller has failed to deliver, it is essential that a re-sale by the buyer should have been contemplated by the parties, in order to entitle the buyer to recover damages to which he has become liable for the breach of his contract with the sub-buyer; and it is arguable that this is not necessary. The damages to the buyer flow as naturally from the breach, if he sells the goods believing them to be fit for the particular purpose for which, to the knowledge of the seller, he bought them, as when he makes use of them himself in that belief; and there does not appear to be any good reason for drawing a distinction between the damages resulting from the breach of the warranty that the goods correspond with the description, and those resulting from the breach of the warranty that they are fit for the purpose for which they are required. Moreover, even when an article, such as a horse, is sold with an express warranty of soundness or the like, and it is re-sold by the buyer with a similar warranty, and in consequence of the breach of it he is sued

(p) (1887) 20 Q.B.D. 79, C. A.

| (q) (1887) 20 Q. B. D. 79, C. A.

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by the sub-buyer, he may recover the damages and costs from the seller, provided that he has acted reasonably in defending the action: and it is not suggested that in such a case it must have been within the contemplation of the parties that the buyer should re-sell (r).

Be that as it may, it is clear that the buyer in such cases is entitled to recover as part of his damages not only the taxed costs which he has been compelled to pay to the successful plaintiff, but also his own costs as between solicitor and client incurred by him in defending the action (s), and where, as is often the case, there is a string of contracts, the damages payable by the seller may be very heavy. The following illustration may be given:

B, a wholesale furrier, bought some dyed rabbit skins from *A* for the purpose, as *A* knew, of making them into fur collars. *B*, having made the fur collars, re-sold to *C*, *C* re-sold to *D* and *D* to *E*, a draper. *E* then sold a coat, with one of those fur collars attached, to *F*, a customer, for her own wear. *F* developed "fur dermatitis" owing to antimony in the fur. *F* sued *E* for breach of warranty on the sale of the coat. *E* gave notice of the action to *D*, *D* to *C*, *C* to *B*, and *B* to *A*. *F* recovered judgment for damages and costs. *E* claimed this sum together with his own costs from *D*, who paid the amount and recovered it from *C*, together with a further sum for his costs. *C* claimed from *B*: *B* paid him and sued *A* for £699 damages for breach of the original warranty on sale of the skins.

The Court, having found as a fact that *E* acted reasonably in defending the original action by *F*, held that *B* was entitled to recover from *A* (1) the damages recovered in the original action by *F*, (2) the costs on both sides in that action and (3) a sum in respect of costs incurred by himself and *C* and *D* respectively in connexion with the claims against them (t).

(r) *Lewis v. Peake* (1816) 7 Taunt. 163, 17 R. R. 475. Indian Contract Act, s. 73, illustration (m).

(s) Following *Agius v. Great Western Colliery Company* (1899) 1 Q. B. 413, C. A. (a case of delay in delivery, but in this respect the principle is the same).

(t) *Kaster & Cohen v. Slavouski* (1928) 1 K. B. 78, as cited in Pollock and Mulla, p. 392, and taken substantially from the head-note to that case. For the sequel see *G. & A. Slavouski v. La Pelletterie de Roubaix Société Anonyme*, 137 L.T. 645. For other cases on this subject see *British Oil & Cake Co. v. Bursall* (1923) 39 T.L.R. 406 (cattle

cake not according to contract; successive purchases); *Pinnock v. Lewis & Peat* (1923) 1 K. B. 690 (copra cake for cattle: damages and costs of action by sub-buyer); *Bennett v. Kreeger* (1925) 41 T.L.R. 609 (fur dermatitis: costs of sub-buyer's action and buyer's own costs as between solicitor and client); *Alison & Co. v. Wallsend Slipway & Engineering Co.* (1926) 43 T.L.R. 104 (buyer compromising action). See also *Dobell & Co. Ltd. v. Barber & Garratt* (1931) 1 K. B. 219, C.A., a case under the Fertilisers and Feeding Stuffs Act, 1926 (statutory warranty that the article was fit to be used as such: damages payable to sub-purchasers).

Buyer must act reasonably.—It is necessary that the buyer should rely on the warranty (*u*) and act reasonably, or to put it in another way, that he should take reasonable steps to minimize the damages; but the result is the same, whether it is more correct to say that a plaintiff must minimize his damages or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably flow from the defendant's breach (*v*). A plaintiff is not, for instance, entitled to recover the costs of defending an action if it is obvious that there is no defence to it, and if by the exercise of reasonable care he could have ascertained before re-selling that the warranty was broken, he re-sells at this own peril (*w*).

On the other hand a buyer is not bound to minimize the damages by doing things which, though in strict law he might be entitled to do them, would be seriously detrimental to his business reputation (*x*).

Other conditions.—There may also be breaches of other conditions which can be treated as breaches of warranty, such as the warranty of title. In such a case also the buyer may be involved in difficulties with sub-buyers, for instance, he may buy a motor car from one who has no right to sell it and may re-sell it to a third person, from whom the true owner may recover it or its value. In such a case also the buyer may recover from the seller the damages and costs to which he may have become liable in an action by the sub-buyer (*y*). Or the goods may have been shipped late under a contract by the terms of which the time of shipment was of the essence of the contract. In such cases, if the buyer accepts the goods, he is entitled to recover the difference between the value which the goods would have had if they had been shipped in time, and the value which they actually have. If there is no difference, the buyer cannot recover more than nominal damages (*z*).

(*u*) The members of the Court differed on this question as a matter of fact in *Dobell & Co. v. Barber & Garratt*, *supra*, last note.

(*v*) *Payzu, Ltd. v. Saunders* (1919) 2 K. B. 581, 589, Scrutton, L.J.; *Houndsditch Warehouse Co., Ltd. v. Wallex, Ltd.* (1944) 1 K. B. 579.

(*w*) *Wrightup v. Chamberlain* (1839) 7 Scott 598, 50 R.R. 855. This does not mean that he must use extraordinary precautions. See *Mowbray v. Merryweather* (1895) 2 Q.B. 640, C.A. So in *Wagstaff v. Shorthorn Dairy Co.* (1883) 1 Cab. & E. 324, where the buyer bought twelve tons of "early Don Regent" seed potatoes, it was ruled that, if the plaintiff should have examined the seed before sowing it, his damages

were the difference between the value of the seed delivered and that contracted for; but if he acted reasonably in sowing it without examination, the damages were the difference between the value of the crop produced and the crop which would have been produced by Don Regent seed. See also *Pinnock v. Lewis & Feat*, *supra*, note (*t*).

(*x*) *Finlay v. Kwik Hoo Tong*, *infra*, note (*z*).

(*y*) Such cases have occurred in England and have been dealt with on this principle, but none appears to have been reported.

(*z*) *Finlay v. Kwik Hoo Tong, etc.* (1929) 1 K.B. 400, C.A.; *Taylor v. Bank of Athens* (1922) 91 L.J.K.B. 776.

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60. Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

Repudiation of
contract before due
date.

Anticipatory breach.—This section (which does not appear in the English Act) deals with the case of what has come to be known as “an anticipatory breach” of contract by one of the parties to a contract of sale; that is to say, a presently expressed or manifested intention not to be bound by his promise to perform his part of the contract when the time of performance arrives. The phrase, however, is, as Lord Wrenbury has pointed out, somewhat unfortunate (a). “There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen L.J.’s words in *Johnstone v. Milling* (b) it is ‘a wrongful renunciation of the contractual relation into which he has entered’.” Whether or not there has, in fact, been repudiation depends on the facts of each particular case (c).

The section is a particular case of a much wider principle which gives an immediate right of action in damages to one party to a contract if and when the other party, before the time of performance, clearly shows his intention not to be bound by and to repudiate his contract. The general principle is embodied in section 39 of the Indian Contract Act, and was, perhaps, first firmly established in English law by the case of *Hochster v. De La Tour* (d); and this principle, which applies in contracts of sale, as in all other contracts, was thus expressed by Cockburn, C.J., in a case which came before the Exchequer Chamber some years later. “The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own ;

(a) *Bradley v. H. Newson Sons & Co.* (1919) A.C. 16, at p. 53.

(b) (1886) 16 Q.B.D. 460, at p. 473.

(c) *Household Machines Ltd. v. Cosmos Exporters Ltd.* (1946) 2 All. E.R.

622.

(d) (1853) 2 E. & B. 678, 95 R. R. 747. For a full discussion see Pollock and Mulla, commentary to s. 39, p. 261, *et seq.*

he remains subject to all his own obligations and liabilities under it and enables the other party not only to complete the contract if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance, which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss" (e).

The case in question was a case of breach of promise of marriage, and no question therefore could arise as to the contract being only partially repudiated by the defendant. But just as actual failure to perform one term of a contract, which contains many terms, does not necessarily give the other party a right to treat it as repudiated, but only a right to sue for damages, so an anticipatory refusal to perform one term of a contract does not necessarily entitle the other party to rescind (f); and this is in truth the principle which underlies section 38 (2) (g). For the rule to apply in such a case, therefore the term in question must be one which goes to the root of the contract, that is, one which, if broken, renders the performance of the rest of the contract substantially different from what the party, not in fault, contracted for (h). Where the contract is in writing, the question whether the term is such as to go to the root of the contract is one for the Court (i).

The other party, moreover, must make his election, and either treat the contract as rescinded for all purposes, or keep it alive for all purposes. He cannot, therefore, bring an action for damages for the anticipatory refusal to perform one term of the contract, and at the same time treat the contract as in existence in other respects (j).

It has already been seen that if the party not in default accepts the other's repudiation and rescinds, he is, so far as anything remains to be done by him at the date of the rescission, discharged from all performance or offer to perform it, and he may therefore recover damages on the basis that he was ready and willing to perform his contract and cannot be sued

(e) *Frost v. Knight* (1872) L. R. 7 Ex., 111 at pp. 112, 113; *Ramier & Bros. v. Ramudu* (1933) 56 Mad. 304, 141 I.C. 632, ('33) A.M. 176.

(f) See *Johnstone v. Milling* (1886) 16 Q.B.D. 460, C.A.

(g) See notes to that section. In cases under that section, it will be remembered, the refusal to perform

or be bound by one term, may amount to evidence of a refusal to be bound by the contract as a whole.

(h) *Johnstone v. Milling*, *supra*.

(i) *George D. Emery Co. v. Wells* (1906) A.C. 415, P.C.

(j) *Johnstone v. Milling*, *supra*; *Nagiseti v. Venkatasubbayya* (1935) 157 I.C. 640, ('35) A.M. 345.

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by the party in default for non-performance (*k*). It may be worth while to add, as the contrary seems to have been contended, that the repudiation which so absolves a party from performance of conditions precedent must have been made before the due date for the performance of the contract by him (*l*).

Measure of damages.—The measure of damages, however, is not affected by the date of the defaulting party's repudiation. It is still fixed, in accordance with the principles already discussed (*m*), by the difference between the contract price of the goods and the market price on the day (*n*), or, if delivery was to be made by instalments, on the several days (*o*), when they ought to have been accepted or delivered, as the case may be; for the plaintiff is to be put as near as may be in the same position as if the contract had been performed. And this is so even if, by reason of the plaintiff electing to treat the defendant's refusal as an immediate breach, the cause of action is complete, or the Court has to assess the damages, before the time fixed for performance has expired (*p*). "The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages" (*q*). There is, however, one important qualification to this general rule, namely, that it is a ground for mitigation of damages if the defendant can show (and the onus of establishing this is upon him) that the plaintiff might have diminished his loss by going into the market on, or after, the day of rescission, and making a forward contract at the then market price (*r*), or by taking other reasonable opportunities to minimize the damages (*s*).

No obligation to accept the repudiation.—This does not mean, however, that the plaintiff is under any obligation to accept the defendant's repudiation and treat it as an immediate breach. He is at perfect liberty to refuse to accept that repudiation and to treat the contract as subsisting

(*k*) *Cort v. Ambergate Rly. Co.* (1851) 17 Q.B. 127, 85 R. R. 369; *Chunna Mal-Ram Nath v. Mool Chand Ram* (1928) 55 I.A. 154, 9 Lah. 510, 108 I.C. 678, ('28) A.P.C. 99 (disapproving *Abaji Sitaram v. Trimbak Municipality* (1903) 28 Bom. 66); *Jhandoo Mal-Jagan Nath v. Phul Chand Fateh Chand* (1924) 5 Lah. 497, 85 I. C. 118, ('25) A. L. 217 and see notes to s. 38 (2).

(*l*) *Steel Brothers Ltd. v. Dayal Khatao & Co.* (1923) 47 Bom. 924, 87 I.C. 67, ('24) A.B. 247.

(*m*) See notes to s. 56 and the provisions of sub-section (3) of ss. 50 and 51 of the English Act there set out.

(*n*) *Boorman v. Nash* (1829) 9 B. & C. 145, 32 R.R. 607; *Phillpotts v. Evans* (1839) 5 M. & W. 475, 52 R. R. 802; *Melachrino v. Nickoll & Knight* (1920)

1 K. B. 693; *Maung Po Kyaw v. Saw Tago* ('33) A. R. 25.

(*o*) *Leigh v. Paterson* (1818) 8 Taunt. 540, 20 R.R. 552.

(*p*) *Brown v. Muller* (1872) L. R. 7 Ex. 319; *Roper v. Johnson* (1873) L. R. 8 C. P. 167; *Melachrino v. Nickoll*, *supra*, note (*n*).

(*q*) *Roper v. Johnson*, *supra*, L.R. 8 C.P., p. 180; *Manindra Chandra Nandi v. Aswini Kumar Acharjya* (1920) 48 Cal. 427, 60 I.C. 337; *Bilasiram v. Gubbay* (1915) 43 Cal. 305, 33 I.C. 23.

(*r*) *Roper v. Johnson*, *supra*; *Melachrino v. Nickoll*, *supra*; *Krishna Jute Mills v. Innes* (1911) 21 Mad. L.J. 182, 9 I.C. 104; *Millett v. Van Heek & Co.* (1921) 2 K.B. 369, C.A.

(*s*) *Payzu, Ltd. v. Saunders* (1919) 2 K.B. 581, C.A.

and the defendant cannot set up against him, if he does so, that if the plaintiff had accepted the repudiation and gone into the market at once the damages would have been less. Some *dicta*, perhaps, may be found which appear to suggest that it is the plaintiff's duty to accept the repudiation where it is clear that the defendant will not or cannot perform his contract (*t*). These *dicta*, however, are contrary to the older authorities (*u*), and such a suggestion has in recent years been at least on two occasions emphatically negated by the Court of Appeal in England (*v*). As far as India is concerned, however, the matter is concluded by the express words of the section.

Measure of damages when goods are to be delivered by instalments and no time is fixed for delivery.—A somewhat difficult question arises when a contract is one for delivery by instalments, no time being fixed for the delivery, and one party refuses to proceed with the contract. It has already been seen that, so far as India is concerned, a contract to be performed within a reasonable time must be treated as a contract which does not fix the time for performance and consequently when there is a refusal to proceed with it, the date on which that refusal is announced must be treated as the date on which the contract is broken, and therefore as the date on which the damages are to be assessed (*w*). This rule cannot, however, be applied strictly to cases where there is an anticipatory refusal to perform a contract to deliver by instalments within a reasonable time. In the case of *Millett v. Van Heek & Co.* (*x*) the contract was for the sale of cotton to be delivered by instalments after a government embargo had been removed, it being uncertain at the time of making the contract when this would be. The seller repudiated the contract, and his repudiation was accepted by the buyer before the removal of the embargo. The buyer claimed that the damages should be fixed by reference to the market price at the date of rescission, but the Court negated this contention. "It is admitted that, if a contract is made for the sale of goods deliverable in the future by specified instalments at specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought

(*t*) *Nickoll and Knight v. Ashton, Eldridge & Co.* (1900) 2 Q. B., at p. 305, per Mathew, J., s.c. in C.A. (1901) 2 K.B., at p. 138, per Vaughan Williams, L.J. Mathew, J., relied upon the case of *Roth & Co. v. Tayse Townsend & Co.* (1896) 1 Com. Cas. 306, as supporting his opinion, but that was a case where the repudiation had been accepted and related therefore solely to the duty of the plaintiff to minimize the damages after he had rescinded the contract.

(*u*) See s. 56 and the examples given in the notes thereto.

(*v*) *Tredegar Iron & Coal Co. v. Hawthorn Bros. & Co.* (1902) 18 T.L.R. 716, C.A.; *Michael v. Hart & Co.* (1902) 1 K. B. 482, C. A. (set out in the notes to s. 56). Mathew, J. (then L.J.) was a party to both these decisions.

(*w*) See s. 56 and notes thereto.

(*x*) (1921) 2 K.B. 369, C.A., affirming the judgment of the Divisional Court; (1920) 3 K.B. 535.

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to have been performed. That is beyond controversy....But it is said that, if no times have been expressed in the contract, and the contract would be construed by law as one for delivery by reasonable instalments over a reasonable time, even though those times might be ascertained as a question of fact by the jury, the plaintiff suing may not merely have an option, but is compelled, to fix his damages in reference to the market price at the time when the repudiation takes place. That, it seems to me, would introduce an anomaly entirely without any kind of principle to justify it. I am satisfied that the code never intended to make that distinction, or to vary what was the rule of law at the time when it was passed...namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation" (y).

Where, however, the contract is for the sale of goods to be delivered by instalments as required, or on like terms, it is difficult to see on what date the measure of damages is to be fixed, if it be not the date of rescission. There is no authority on this point, but the analogy of cases of such breaches of contract other than contracts of sale would seem to point to the conclusion that the date of rescission must be taken to be the date at which to assess the damages (z).

Results of treating the contract as subsisting.—If the party not in default declines to accept the other party's repudiation, as will be seen from the judgment in *Frost v. Knight* already quoted, he keeps the contract alive for all purposes. It follows from this that if, when the time for performance arrives, he himself is unable to perform or does not perform his contract, the position will be the same as it would have been if there had been no anticipatory repudiation by the other party and the latter will be discharged and, indeed, may himself sue for damages (a). If, therefore, the seller, for instance, after refusing to accept the buyer's anticipatory repudiation, when the time for performance arrives, tenders goods which are not of the contract description, or under a c.i.f. contract tenders documents which the buyer is not bound to accept, the buyer may lawfully reject the goods or the documents and the seller

(y) *Atkin, L.J.*, (1921) 2 K.B., at pp. 376-377. The method of assessing the damages declared by the Court to be the correct one is set out in (1920) 3 K.B., at p. 543; and in effect is that the time at which deliveries would have been made must be ascertained and the damages must be the difference between the contract price and the market price on those dates, subject to any mitigating circumstances which the seller might establish.

(z) See *Ramgopal v. Dhanji Jadhavji Bhatia* (1928) 55 Cal. 1048, L.R. 55 I.A. 299, 111 I.C. 480, ('28) A.P.C. 200 (anticipatory breach of contract for work and labour).

(a) Cf. *Croockewit v. Fletcher* (1857) 1 H. & N. 893, 108 R. R. 882; *Phul Chand-Fateh Chand v. Jugal Kishore-Gulab Singh* (1927) 8 Lah. 501, 106 I.C. 10, ('27) A.L. 693; *Burn & Co. v. Morvi State*, (1926) 30 Cal. W.N. 145, 90 I.C. 52, ('25) A.P.C. 188.

will be without remedy; or the buyer may accept the goods tendered and treat the breach of condition as a breach of warranty and recover damages accordingly.

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It must be confessed, however, that in this connexion considerable difficulty has been caused by the case of *Braithwaite v. Foreign Hardwood Co. (b)*. In that case the contract was for the sale of about 100 tons of rosewood for shipment in the year 1903 to be delivered at Hull in instalments during that year, cash payable against bill of lading. An instalment was shipped, but before any further performance the buyers repudiated the contract on the ground that the sellers had broken some collateral agreement. It was found as a fact, however, that no such agreement had been made and therefore the buyers' repudiation of the contract was wrongful. The buyers refused to accept the tender of the bill of lading which arrived on October 30th; the ship arrived on November 9th and the sellers sold the cargo against the buyers. Some of the rosewood in that consignment, however, was of inferior quality. It appears to have been held by the Court of Appeal that the buyers could not rely upon this fact either as justifying them in rejecting the goods or in mitigation of damages, though the trial Judge did make some allowance to the buyers in respect of the inferiority of the consignment and his judgment was not actually reversed on this point by the Court of Appeal ordering that the allowance should be disallowed. This, however, may have been due to the fact that there was no cross appeal by the plaintiffs (c).

Sir Mackenzie Chalmers questioned the correctness of this decision (d): Greer, L.J., while a judge of the first instance, suggested that it was to be explained on the ground that the bill of lading was not actually tendered, and what was described in the report as a tender was merely an intimation by the sellers to the buyers that they were ready to tender it and the buyers informed them that they would not accept it if it were tendered and thereby dispensed with any further performance by the sellers (e): while Lord Sumner has said that as reported it is not quite easy to understand (f), and that "in effect it was said that, even after the seller had, as it was called, kept the contract alive and proposed to tender the cargo, he had been told a second time, in terms of the first refusal, 'you need not tender any cargo to us at all; a *fortiori* you need

(b) (1905) 2 K. B. 543, C.A., cf. *Rustamji v. Haji Hussain* (1920) 22 Bom. L.R. 1165, 59 I.C. 515.

(c) The buyers also refused to take the second consignment, but as this was in order no question arose as to the liability of the buyers to pay damages or of the amount for which they were

liable.

(d) Chalmers, p. 90.

(e) *Taylor v. Oakes Roncoroni & Co.* (1922) 127 L. T. 267, at pp. 269, 270. This case is set out in the notes to s. 38.

(f) *British & Beningtons, Ltd. v. N. W. Cachar Tea Co.* (1923) A. C. 48, at p. 70.

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not tender a cargo which is in conformity with the contract. You have a cargo of some sort, which we refuse to take; and you may prove your damages for that, if we fail to prove you wrong' (g), which seems to indicate that his interpretation of the case is the same as Greer, J's. *Braithwaite's* case however has never been overruled, but, whatever be the explanation of it or of its exact effect, it did not lay down the proposition that when there has been a repudiation by one party on a given ground and an acceptance of that repudiation by the other party, the former can no longer rely on any other ground for refusing to perform his obligations and particularly cannot require the latter to prove his readiness and willingness to perform any of his obligations under the contract thus repudiated, and if it does lay down that proposition it is wrong (h).

Justification of alleged breach of contract.—It is also clear that *Braithwaite's* case has no application at all to cases where a contract is repudiated not by an anticipatory refusal to perform it before the time for performance arrives, but by failing to perform it when the time for performance has arrived; and therefore does not decide that if, say a buyer refuses to accept goods when tendered to him and gives a wrong reason at that time for his refusal, he cannot, if afterwards sued for breach of contract, advance another reason for that refusal and rely on it if it is a good reason. It is well established law that a party to a contract may justify his failure to perform it on any ground which existed at the time of his refusal to perform, whether he knew of that ground or not at the time, or whether he gave that as his reason for his refusal or not, and it makes no difference if he gave some other and invalid reason (i).

The rule in fact is but an example of the wider rule that justification is a conclusion of law which necessarily results from a given state of facts (j), and therefore if any particular act is on the facts justified, whether it be complained of as a breach of contract or as a tort, it does not matter whether the right or the wrong reason or no reason at all was given for it at the time when it was done. If, therefore, the case of *Nannier v.*

(g) *Ib.*, at p. 71. See the whole of Lord Sumner's observations on this case, at pp. 70-72.

(h) Per Lord Sumner, *ib.*, p. 70.

(i) See *Taylor v. Oakes*, *supra*, and for examples see *Levy v. Green* (1859) 1 E. & E. 969, 117 R. R. 552; *Hession v. Jones* (1914) 2 K. B. 421, at pp. 424-5; *Alexander v. Webber* (1922) 1 K. B. 642; *Parthasarathy Chetty & Co. v. T. N. Gajapathy Naidu & Co.* (1925) 48 Mad. 787, 91 I.C. 568, (23) A.M. 1258. (It is true that in this case the Court suggested that there might be a

difference if the seller had not been claiming the difference between the contract price and the price realized on a re-sale of the goods, which he had carried out under the express terms of the contract, and had instead been claiming as damages the difference between the contract price and the market price. With great deference, however, there is neither in law nor in logic any difference between the two cases).

(j) See *Sutton v. Johnston* (1786) 1 T. R. at p. 507, 1 R. R. 257.

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Rayalu Iyer (k) really did decide that a buyer, who rejects goods on the ground that they were delivered late, cannot afterwards show that the goods were not according to contract and escape liability on that ground, it lays down a proposition which can only be described as entirely novel and in conflict alike with authority and principle (l). The matter has now been concluded by a Privy Council decision (m) that a defendant is entitled to justify his repudiation on any ground which existed at the time of repudiation.

61. (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price—

- (a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable ;
- (b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which the payment was made.

(k) (1925) 49 Mad. 781, 93 I. C. 673, ('26) A.M. 778. So decided in *Ramier & Bros. v. Ramudu* (1933) 56 Mad. 304, 141 I. C. 632, ('33) A.M. 176.

(l) It is not clear that the Court did decide this, but it must be confessed that that case also is not as reported quite easy to understand. There appears according to the report to have been a tender and a refusal of the goods in October and November, and in January the sellers wrote a letter threatening to sell if the buyers would not accept the goods, in reply to which the buyers wrote that they would not accept on the ground that delivery had not been made in time. The Court appears to have thought that the contract was kept open by the sellers until the 16th January, but a contract which has been once broken cannot be kept

open; and an offer by the seller to tender the goods again, if the buyer will accept them, is in law proposal that the late acceptance should be treated as an accord and satisfaction of the breach and if such proposal is not accepted the only remedy for the seller is to sue for the original breach (cf. *Muthaya Maniagaran v. Lekku* (1912) 37 Mad. 412, 14 I. C. 255). If therefore there was an actual tender and refusal to accept the goods in November, that refusal was a breach of contract, but if the goods tendered were not of the contract description the buyer was entitled to rely upon that fact, even if he gave as the ground for rejecting them that they were tendered late.

(m) *Sivayya v. Ranganayakulu* (1935) 62 I. A. 89, 58 Mad. 670, 154 I. C. 1097, ('35) A.P.C. 67.

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Special damages.—This section preserves the right of a party to a contract of sale to recover special damages, that is to say, compensation for any loss or damage caused to him by the other party's breach of contract "which the parties knew when they made the contract to be likely to result from the breach of it" as it is expressed in section 73 of the Indian Contract Act, or as expressed in *Hadley v. Baxendale* (n) for "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." These damages are contrasted with those "which naturally arose in the usual course of things" from the breach. Generally speaking these latter alone are recoverable by the plaintiff, "but this rule is subject to the limitation, that where the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account" (o).

In the case of a contract of sale, at any rate, it is not easy to draw a line between the two classes of damages. As has already been seen, damages which result from the breach of warranty that the goods correspond with the description are treated as arising naturally in the usual course of things from the breach, although they are special damages in the sense that notice of them ought to be given in the pleadings: and similar damages have hitherto been treated as special damages in the full sense of the term in cases where there is a breach of warranty of fitness for a particular purpose; though the Courts have not found much difficulty in saying that such damages were in the contemplation of the parties (p). The cases in which the distinction is most firmly insisted on are those in which the breach of contract is the seller's failure to deliver, and the buyer seeks to recover as damages the loss which he has sustained by reason of his consequential failure to perform his contracts with third parties and the like. The most convenient course will be to set out some of the cases on this question (q).

(1) The defendant agreed to sell and deliver on August 14th a threshing machine to the plaintiff. The plaintiff was a farmer and required the machine for threshing about August 14th, all of which facts were well known to the defendant. The defendant failed to deliver the machine, but kept assuring the plaintiff that he should have it at once, and the

(n) (1854) 9 Ex. 341, at p. 354, 96 R. R. 742. See Pollock and Mulla, pp. 396-400, for a full discussion of the rules laid down in this case.

(o) Cotton, L. J., *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q.B.D. 670, 677, C. A.

(p) See s. 59 and notes thereto.

(q) In the judgments in some of these cases doubts are expressed whether notice of special circumstances at the time of entering into the contract would by itself suffice to make the defendant liable. As regards India these doubts may be ignored. See Pollock and Mulla, p. 398.

plaintiff consequently only made one effort to hire another machine, which was unsuccessful. The plaintiff was therefore obliged to stack the wheat, and while stacked it was damaged by rain and had to be dried in a kiln. When it was finally sold, the market price of wheat had fallen.

The plaintiff was held entitled to recover as damages the cost of stacking the wheat, the loss due to its deterioration by being damaged by rain and the expense of drying it : but not for the fall in the market price : *Smeed v. Foord* (1859) 1 E. & E. 602, 117 R. R. 365.

Conversely, the seller could not have claimed that a rise in the market price could be taken into account to mitigate the damages.

(2) Plaintiffs bought caustic soda from the defendants for shipment in June, July and August. The defendants knew that the plaintiffs had bought it for re-sale on the Continent, and before the end of August learnt that it was destined for Russia. The plaintiffs had contracted to sell the soda to a merchant in Russia. Some of the soda was delivered late, and the plaintiffs were compelled to pay increased freight and insurance, owing to the approach of winter, on dispatching it to Russia. The rest was not delivered : and the plaintiffs had to pay a sum of money to the merchant in Russia to compensate him for damages which he had to pay to a buyer from him. There was no market where the plaintiffs could purchase caustic soda.

It was conceded that the plaintiffs were entitled to recover as damages the profit, which they would have made on the re-sale to the merchant in Russia, and it was held that they were entitled to recover also the increase in the freight and insurance, but not the sum which they had had to pay to the Russian merchant : *Borries v. Hutchinson* (1865) 18 C.B. (N.S.) 445, 144 R. R. 563.

This is one of the cases in which, in the absence of an available market, the price obtained on the re-sale can be taken as the value of the goods. The increased freight, however, was special damage.

(3) The plaintiffs contracted to supply 500 waggons to a Russian Company by May 1st, under penalty of 2 roubles per waggon for each day's delay. They bought from the defendants 100 sets of wheels and axles to be constructed according to tracings and to be delivered by April 15th, and, during the negotiations with the defendants, informed the defendants that they required them to complete waggons which they were bound to deliver under penalties, without mentioning the amount of the penalties or the exact date on which the waggons had to be delivered. The wheels and axles were not delivered on the stipulated date, and the plaintiffs became liable to penalties to the extent of £200, which the Russian Company consented to reduce to £100.

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It was held that the jury might award that amount as special damages : *Elbinger Actien-Gesellschaft v. Armstrong* (1874) L.R. 9 Q.B. 473.

(4) The plaintiff contracted to supply at the end of August a certain machine called a "gunpowder pile driver"; and the defendants agreed to manufacture an essential part of this machine called "a gun". The defendants knew at the time that the machine was wanted at the end of August, and undertook to manufacture the gun as soon as possible. Owing to their not having a sufficiently skilled foreman in their employment, they failed to deliver the gun until the end of September. The purchaser of the machine thereupon refused to accept it. The plaintiff claimed as damages the profit which he would have made on the contract to supply the machine, the expenditure incurred by him in making other parts of it (which had been rendered useless as no market could be found for the machine), the cost of painting to preserve it and of warehousing it.

He was held entitled to damages under all those heads except the last : *Hydraulic Engineering Company v. McHaffie Goslett & Co.* (1878) 4 Q.B.D. 670, C.A.

(5) The plaintiff bought from the defendants certain sheep-skins for the purpose, as the defendants knew, of re-selling them to a buyer in France at a profit to the plaintiff of 5 francs a skin. The defendants failed to deliver the skins, and the plaintiff was condemned to pay damages by the French Courts for breaking his contract with the French buyer. The skins could not be obtained in the market.

The plaintiff was held entitled to recover not only the loss of profit but the damages which he had paid in addition : *Grébert-Borgnis v. J. & W. Nugent* (1885) 15 Q.B.D. 85, C.A.

(6) The plaintiff, a coal merchant, contracted with shipowners for the supply of coal to their ships at a certain port, and entered into contracts with the defendants for the supply of coal to him for shipment in those steamers. The defendants failed to deliver within the contract time, and consequently a steamer was delayed. The plaintiffs when sued for damages put at £150 defended the action and paid £20 into court, which was found to be sufficient.

It was held that the plaintiff was entitled to recover from the defendants the £20 paid into court and his costs reasonably incurred over and above the amount which he had received as costs between party and party in that action : *Agius v. Great Western Colliery Co.* (1899) 1 Q.B. 413, C.A.

(7) The defendants sold on c.i.f. terms an unascertained cargo of Australian wheat to the plaintiffs in November which the plaintiffs re-sold

on similar terms, and there were further sub-sales in a chain of "string" contracts. The sellers in the following January nominated a certain ship as the ship which contained the cargo, but though they had the documents in March they deliberately refused to deliver them to the buyers. The contract was made subject to the conditions of the London Corn Trade Association.

It was held by the House of Lords that the sale was the sale of a cargo of an individual ship, and not merely the sale of corn in bulk, and by the terms of the contract it was contemplated that the buyer might re-sell the cargo and in such a case the seller agreed to put the buyer in a position to fulfil his contract. The buyer was therefore entitled to recover as damages the loss of profit on his sub-contract and also to be indemnified against any damages which he might have to pay to sub-purchasers: *R. & H. Hall Ltd. v. W. H. Pim (Junior) & Co.* (1928) 33 Com. Cas. 324, 139, L. T. 50.

It will be observed that in nearly every case where special damages have been recovered by the buyer, the subject matter of the sale has been something for which there was no available market, sometimes because it was a thing which had to be specially manufactured. The case of *Hall v. Pim* is an exception, and is therefore an exceptional case, depending upon its particular facts and the construction of the contract. One fact to be observed is that as the buyer had committed himself to sell that particular cargo, it would not have been a performance of his contract if he had tendered other corn to his sub-purchasers. Where, however, the contract is for the sale of unascertained goods and there is a market, the difference between the market price and the contract price is the measure of damages, even if the seller knew that the buyer wanted the goods for the purpose of re-sale (r).

Regarded from another point of view, this rule may be considered as an example of the proposition that it is the duty of a person complaining of a breach of contract to minimize the damages. If the buyer can still fulfil his contract by obtaining other goods in the market, it is his duty to do so (s). The distinction between cases where the breach consists of non-delivery and those where it consists of a breach of warranty is clear; for in the latter case the mischief may be done by using or otherwise dealing with the goods on the assumption that they are what they are warranted to be, a very different position from that which arises when the goods are not placed at the disposal of the buyer at all.

(r) See *Williams v. Reynolds* (1865) 6 B. & S. 495, 141 R. R. 488; *Grébert-Borgnis v. Nugent* (1885) 15 Q. B. D. 85, C. A., at p. 89. For a summary of the rules as to damages for non-delivery, see Benjamin on Sale, pp. 1018-1020.

(s) As to mitigation of damages, see Pollock and Mulla, pp. 399-400.

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Failure of consideration.—"It is well established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed (t)." In order, however, that the money may be so recovered, the failure of consideration must be total, as it is when the seller fails to deliver the goods or tenders goods which the buyer lawfully rejects; and even if the buyer has had the use of the goods and is deprived of them by their true owner, he may recover the price for the breach of the condition as to title (u). Normally, however, where the buyer has had the goods he cannot recover the price as money had and received, and must bring an action for damages, unless indeed he can rescind the contract.

This may happen either by express agreement or under a condition in favour of the buyer or when the buyer accepts the seller's repudiation of the contract. The buyer also may rescind if the contract be induced by the fraud of the seller and perhaps even by his innocent misrepresentation (v). Similarly money given for a forged bill or note or railway scrip, bonds which are valueless as not being properly stamped, or specific goods which were not in existence at the time of the contract or have ceased to exist before the risk has passed to the buyer, can be recovered. It is to be observed, however, that when, under the contract of sale, the risk has been transferred to the buyer and the goods perish, he has to bear the loss and cannot recover the price. Where the contract is entire and the seller fails to perform part of it, the buyer may treat such failure as a total failure to perform the contract, and recover the price (w), but if he accepts the partial performance then there is only a partial failure of consideration and neither the price nor any part of it can be recovered as money had and received (x). If, however, the contract is severable, and part is not performed, the buyer may recover as for a total failure of part of the consideration, and a contract though originally entire may be capable of

(t) *Royal Bank of Canada v. The King* (1913) A. C. 283, 296, P.C. cf. *Piarr* (or *Pyare*) *Lal v. Mina Mal* (1928) 50 All. 82, 102 I.C. 766, ('27) A.A. 621; *Damodhar v. Allabux* (1943) Nag. 762, 210 I.C. 625, ('43) A.N. 332.

(u) *Rowland v. Divall* (1923) 2 K. B. 500, C.A.

(v) At common law the contract could only be rescinded if the innocent misrepresentation was fundamental, see *Kennedy v. Panama New Zealand & Australian Mail Co.* (1867) L. R. 2 Q. B. 580: but the rule is different in equity, and the equitable rules now prevail.

See *Lever Bros. v. Bell* (1931) 1 K. B. 588, per Scrutton, L. J. The same learned judge also questions the rule laid down in *Seddon v. North Eastern Salt Co.* (1905) 1 Ch. 326, that a contract cannot be rescinded for innocent misrepresentation when executed. The decision in *Lever's* case was reversed in the House of Lords, where the legal position in the case of contracts induced by mistake is fully discussed (1932) A.C. 161.

(w) *Giles v. Edwards* (1797) 7 T.R. 181, 4 R. R. 414.

(x) *Harnor v. Groves* (1855) 15 C. B. 667, 100 R. R. 535.

severance, and if it is so severed, as when the buyer is content to accept short delivery, a proportionate part of the purchase price may be recovered (y). In a c.i.f. contract, the purchase price was paid by the buyers on receiving a delivery order coupled with an undertaking by the sellers' agent to honour the delivery order according to the terms of the Bill of Lading. The right to delivery of insurance documents was waived by the buyers. The property in the goods remained throughout in the sellers. Owing to war conditions, the ship carrying the goods was diverted by the sellers, without notice to the buyers, to a new destination where the cargo was sold by the sellers. The buyers claimed the amount paid by them on the ground that the consideration for the payment had wholly failed. It was held that on a true construction of the contract, it was not a c.i.f. contract, and the consideration had wholly failed and that the buyers were entitled to recover money paid by them (z).

Frustration of contract—See Pollock and Mulla's Indian Contract Act (7th Ed.), p. 308 *et seq.*

Interest by way of damages. (a).—Act XXXII of 1839 provides for the payment of interest by way of damages in certain cases. Under that Act the Court may allow interest on debts or sums certain which are payable by an instrument in writing, from the time when the amount becomes payable where a time is fixed for payment, or, where no time is fixed, from the date on which demand for payment is made in writing giving notice to the debtor that interest will be claimed (b). That Act follows an English Act, the Civil Procedure Act, 1833, section 28 (c), and in England the interest can only be recovered in cases which come within the provisions of that Act, unless there is an agreement to pay interest, which may be inferred, however, from the course of dealing between the parties (d), or interest is recoverable by custom, as in the case of a debt payable by a negotiable instrument, when interest is recoverable by the custom of merchants, or, as it is called, the law merchant. Generally speaking, therefore, by the law of England a seller cannot recover interest when the buyer is in default in paying the price, nor can the buyer recover it when claiming a refund of the purchase price. These questions have caused considerable debate in India also, but the matter is set at rest by the provisions of sub-section (2), and no useful purpose, therefore, can be served by going further into the previous state of the law.

(y) See s. 37 and notes thereto; *Bevaux v. Conolly* (1849) 8 C. B. 640, 79 R. R. 659; *Biggerstaff v. Rowatt's Wharf* (1896) 2 Ch. 93, C.A. (set off in the case of liquidation of a company).

(z) *Comptoir D'Achat et de Vente du Doerenbond Belge S. A. v. Luis de Ridder Limitada.* *The Julia*, (1949) 1 All.

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(a) For a full discussion of this subject, see Pollock and Mulla, pp. 406-408.

(b) *Op. Cit.*, pp. 406-408.

(c) 3 & 4 William IV, c. 42.

(d) *Re The Marquis of Anglesey* (1901) 2 Ch. 548, C.A.

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Seller's right to recover interest.—It will be observed that the seller can only recover interest when he is in a position to recover the price. When he can only sue for damages for breach of contract, he is not entitled to interest under the provisions of this sub-section. The words "from the date of the tender of the goods" appear to contemplate cases where delivery may be made at the option of the seller during a stated period, such as the last fortnight in a specified month, or during a specified month, and payment of the price is only due on delivery; so if there be a contract for the sale of specific goods, in such circumstances that the property passes to the buyer and the goods are to be delivered during the month of December, the price being payable on delivery, and the seller tenders delivery on the 15th December, and the buyer wrongfully refuses to accept it, the date from which interest will be recoverable will be the 15th December. In other cases the date from which interest is payable must be ascertained from the terms of the contract. In a case where there is a sale of specific goods, where nothing is said about credit or delivery, the price will be payable on the date of the making of the contract, and interest will be recoverable from that date. Where the price is to be paid on a day certain, whether the goods are delivered or not, that day will be the date from which interest will be recoverable, and so on.

Buyer's right to recover interest.—Again the buyer can only recover interests when he is entitled to recover the purchase price, that is to say, when he can sue for the price prepaid as money had and received, by reason of total failure of consideration. He cannot recover interest when his only remedy is to sue for damages, for instance, for a breach of warranty, even though those damages may be sufficient to extinguish the price. Moreover he is only entitled to interest in the case of a breach of contract by the seller. This limitation, therefore, excludes cases arising under sections 7 and 8, and presumably other cases where the contract is dependent upon some condition inserted for the benefit of the seller, and is not performed owing to the non-fulfilment of that condition, or the contract is frustrated by circumstances over which the seller has no control, so that in law he would not be liable to an action. If a contract is rescinded by mutual consent, it must depend upon the terms of the rescinding agreement whether the buyer may recover interest. Under English law, interest is recoverable where money is obtained by fraud, and it would seem therefore that if the buyer rescinds the contract on the ground that it was induced by fraud, he can recover interest under this section, but it is more doubtful whether he can recover it if he succeeds in setting aside the contract on the ground of innocent misrepresentation. Perhaps he can, on the ground that in such cases the parties are to be restored as far as possible to their original position (e).

(e) *In re Metropolitan Coal Consumers' Association* (1892) 3 Ch. 1, 17, C.A.

CHAPTER VII.

MISCELLANEOUS.

62. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

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Exclusion of implied terms and conditions.

Implied terms.—The question of what terms are to be implied in a contract is a question of law. “The Court, and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included. It must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted” (f). In the case of a contract of sale those terms are defined by the Act and there is therefore no need that they should be expressed. On the other hand, the Act does not compel the parties to make their contracts according to the rules of law which it contains, and they may make what terms they please, provided that the contract is not illegal. They may therefore exclude any of the terms or conditions which the law usually attaches to a contract of sale, and create for themselves any special rights and obligations that they please, including, if they are so minded, provisions whereby the seller may derive an advantage from his own default (g).

Exclusion of terms implied by the Act.—The party, however, who wishes to exclude or escape from terms and conditions by which he would normally be bound must do so in clear and unambiguous language. An ambiguous document is no protection to him (h), and the provisions of section 16 (4) must always be kept in mind. Merchants, moreover, do not appear to have grasped the distinction which the Act draws between

(f) *In re Comptoir Commercial Anversois and Power Son & Co.* (1920) 1 K. B. 888, 899-900, C.A.; *Tournier v. National Provincial and Union Bank of England* (1924) 1 K. B. 461, C.A., and cases cited by Atkin, L. J., at p. 483; *Official Assignee of Madras v. Frank Johnson Sons & Co.* (1931) 54 Mad. 409, 128 I.C. 849, ('31) A.M. 65.

(g) *Lancaster v. Turner* (1924) 2 K. B.

222, C.A., a case arising out of the “invoicing back” clause. See also *In re Bourgeois and Wilson Holgate & Co.* (1920) 25 Com. Cas. 260, as to the effects of this clause.

(h) *Elderslie S. S. Co. v. Borthwick* (1905) A. C. 93, 96; *J. Gordon Alison & Co., Ltd. v. Wallsend Slipway & Engineering Co., Ltd.* (1926) 43 T.L.R. 104.

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conditions and warranties, and are apt to use the word "warranty" or "guarantee" in their contracts, when in all probability they mean what the Act calls a condition, and find in consequence that they have not excluded an implied condition, by which therefore they are still bound (i). In particular the efforts to exclude by agreement the buyer's right to reject are constantly failing owing to a failure to appreciate the full results of the implied condition that the goods must answer the description or be of the contract quantity (j).

Course of dealing.—"That phrase means, I conceive, that past business between the parties raises an implication as to the terms to be implied in a fresh contract, where no express provision is made on the point at issue.... I think that a course of dealing may arise with equal force whether from a written or parol bargain, or from the repeated occurrence of similar methods as between the parties. In each case the question is as to the implication to be drawn from the past as applied to a new transaction" (k).

As in the case of express agreement, the course of dealing must point clearly to an unambiguous agreement to create obligations or rights which do not normally attach to a contract of sale, or to negative or vary those which normally attach, and it is not clear that by course of dealing the parties can dispense with what the law regards as essential to the performance of a contract, for instance, dispense with the necessity of tendering the proper documents under a c.i.f. contract (l).

Usage.—Section 1 of the Indian Contract Act provides that nothing in that Act shall affect any usage or custom of trade not inconsistent with the provisions of that Act. The effect of section 62 is to maintain such usages and customs of trade, although they negative or vary, and therefore are inconsistent with, the general provisions of the law, so long as they bind both parties to the contract of sale.

(i) See, for instance, *Wallis v. Pratt* (1911) A.C. 394; *Baldry v. Marshall* (1925) 1 K. B. 260, C.A.; *Barker (Junior) & Co. v. Agius, Ltd.* (1926) 33 Com. Cas. 120, (1927) 43 T.L.R. 751.

(j) See, for instance, *Green v. Arcos* (1931) 47 T.L.R. 337, C.A.; *Meyer, Ltd. v. Osakeyhtio Carelia Timber Co.* (1930) 36 Com. Cas. 17, 142 L. T. 480. "I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart.... Commercial men carry on an enormous mass of business under the system of 'string contracts,' under which A, who has made a contract with B, goes to arbitration with Z, of whom he never before heard and with whom he has in the eyes of the law no contrac-

tual relations. Their view of damages as a sufficient remedy for breach of contract entirely differs from the law's remedy of rejection. The commercial man does not think there can be no contract to make a contract when every day he finds a policy 'premium to be agreed' treated by the law as a contract." *Scrutton, L. J., W. N. Hillas & Co. v. Arcos, Ltd.* (1931) 36 Com. Cas. 353, 368.

(k) *McCardie, J., Pocahontas Fuel Co. v. Ambatielos* (1922) 27 Com. Cas. 148, 152-153.

(l) *Malmberg v. H. J. Evans & Co.* (1924) 41 T.L.R. 38, 40, C. A., per *Atkin, L.J.*, 30 Com. Cas. 107; cf. *Steel Brothers Ltd. v. Dayal Khatao & Co.* (1923) 47 Bom. 924, 87 I.C. 67, ('24) A.B. 247.

The English Court of Appeal considered the corresponding section of the English Act (s. 55) in *Cointat v. Myham & Son (m)*. In that case the plaintiff, a butcher, had bought in a meat market the carcass of a pig from the defendants, who were meat salesmen in the market. The plaintiff, in ignorance of the fact that it was tuberculous, exposed it for sale and it was seized by a meat inspector, adjudged unfit and condemned to be destroyed, and the plaintiff was fined. In an action brought by the plaintiff against the defendants, the plaintiff claimed damages for breach of an implied warranty, relying on section 14 of the English Act (which corresponds with s. 16 of this Act) to which the defendants replied that by the usage of the trade such an implied warranty was excluded. The Judge refused to leave the question of usage to the jury, and directed them that usage could not override the law. On appeal it was held that section 55 was a special provision allowing usage to affect the question of liability under a contract for the sale of goods.

Usages are imported into contracts as implied terms, not because they have any intrinsic authority, but because the parties are deemed to have contracted with reference to them (n). A usage is therefore unlike a general custom, in that no consideration of antiquity arises; and, whilst the length of time during which a usage has existed is of some importance in determining whether it has become established (o), it may be of recent origin (p). It may be in the course of growth (q).

A usage must be well known amongst those engaged in the business to which it is sought to apply it, so that it may be assumed that the parties contracted with reference to it (r). It must be general and it is not sufficient that it should be recognized as applying to a majority of cases (s). It has been said to be the duty of a person engaged in a particular trade to make himself, by due enquiry, acquainted with the usages of it (t). The usage must be reasonable, and consistent with the remainder of the contract, and the party setting it up must prove it, if it be disputed (u).

The Indian Evidence Act, section 92 (5) enables oral evidence to be given of any usage or custom annexing to a written contract incidents not expressly mentioned in the contract, but usually annexed to contracts of

(m) (1914) 84 L. J. K. B. 2253.

(n) Pollock and Mulla, p. 58. *Benay Krishna v. North Bengal Sugar Mills Co. Ltd.* (1945) 2 Cal. 173.

(o) *Edelstein v. Schuler & Co.* (1902) 2 K. B. 144.

(p) *Bechuanaland Exploration Co. v. London Trading Bank* (1898) 2 Q. B. 658.

(q) *Moult v. Halliday* (1898) 1 Q. B. 125.

(r) *Bartlett v. Pentland* (1830) 10 B. & C. 760, 34 R. R. 560.

(s) *Holderness v. Collinson* (1827) 7 B. & C. 212, 31 R. R. 174.

(t) *Russian Steam Navigation Trading Co. v. Silva* (1863) 13 C. B. N. S. 610, 134 R. R. 676, per Willes, J.

(u) *Balaram Paramasukdass v. Gudiya-tam Govinda Chetty* (1925) 49 Mad. L. J. 200, 91 I. C. 257, ('25) A. M. 1232.

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that description. The incident, so sought to be annexed, must not be repugnant to or inconsistent with the express terms of the contract (v).

63. Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

The same rule is laid down in section 56 of the English Act : and comparison may be made with section 46 of the Indian Contract Act. References to reasonable time are made in sections 24, 36 (2), 42, 44 and 54 (2). Section 36 (2) makes the same provision as to what is a reasonable hour.

Auction sale. **64.** In the case of a sale by auction—

(1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner ; and, until such announcement is made, any bidder may retract his bid ;

(3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction ;

(4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person ; and any sale contravening this rule may be treated as fraudulent by the buyer ;

(5) the sale may be notified to be subject to a reserved or upset price ;

(6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

(*) *Leopold Walford v. Affreteurs* | *Bata Kristo* (1927) 54 Cal. 549, ('27)
Reunis S. A. (1918) 2 K. B. 498, | A. C. 668 and Indian Evidence Act,
 C.A. ; *Holmes Wilson & Co., Ltd. v.* | s. 92 (5).

Scope of the section.—This section is based upon section 58 of the English Act, though it is somewhat differently arranged. It only deals with the rights and liabilities of the parties to the contract of sale. A man may, no doubt, sell his own goods by auction, or an auctioneer may so act as to incur all the liabilities of a seller of goods, but normally when goods are sold by auction they are sold on behalf of the owner by the auctioneer and the agency is disclosed, though the principal on whose behalf the auctioneer is acting as agent often is not. The Act does not, however, deal with the rights and liabilities of the auctioneer, either in relation to his principal or to the buyer.

Each lot the subject matter of a separate contract.—The rule as declared by this section is well settled. It may be excluded by clear evidence of a contrary intention, and the language of sub-section (1) which is more guarded than that of section 122 of the Indian Contract Act, which it replaces, provides for this (*w*).

Completion of the contract.—The owner of each lot put up for sale makes the auctioneer his agent to invite offers for it, and 'every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to.' Hence a bidder may withdraw his bid at any moment before the fall of the hammer (*x*). It is common to insert in conditions of sale a proviso that biddings shall not be retracted, but it seems that such a condition is inoperative in law (*y*), for a one-sided declaration cannot alter the bidder's rights under the general law, nor is there any consideration for his assenting to it, even if he could be supposed to assent by attending the sale with notice of the conditions.

The English rule that a bid may be withdrawn at any time before the fall of the hammer was followed in British India before the Act (*z*). When the bid of an agent at an auction sale was accepted by the auctioneers *kutchi-pucca* (subject to sanction of the owner of the goods) and the agent agreed thereto, it was held that this did not preclude the principals of the agent from exercising their right of retracting the bid before it was accepted by the auctioneers (*a*).

Refusal to accept a bid.—It would seem to follow from the provisions of sub-section (2) that the bid, being only an offer, need not be accepted; and undoubtedly if it be not accepted there is no contract of sale. There is, however, some English authority for saying that where a

(*w*) *Emmerson v. Heelis* (1809) 2 Taunt. 38, 11 R. R. 520; *Roots v. Lord Dormer* (1832) 4 B. & Ad. 77, 38 R. R. 231. For an instance of the presumption being rebutted see *Franklyn v. Lamond* (1847) 4 C.B. 637, 72 R. R. 671.
(*x*) *Payne v. Cave* (1789) 3 T. R. 148,

1 R. R. 679. Indian Contract Act, s. 5.
(*y*) Such was Lord St. Leonards' opinion. *Dart V. & P.*, 6th edition i.-139.
(*z*) *Agra Bank v. Hamlin* (1890) 14 Mad. 235.
(*a*) *MacKenzie v. Chamroo* (1889) 16 Cal. 702.

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sale by auction is announced to be without reserve, a preliminary contract arises between the seller and the highest bidder that the latter shall be the purchaser (b). It appears also that before the passing of the English Act the law in Scotland was that the auctioneer was bound to knock down the lot to the highest bidder, but the Scottish Courts have decided that the law is altered by the provisions of the Act, and the refusal of the auctioneer to accept the bid gives no cause of action to the bidder at all (c), the seller being as free to refuse the offer of the buyer, as the buyer is to withdraw it before acceptance. It is clear also that to withdraw goods from the auction without putting them up for sale at all does not give any cause of action to prospective buyers, even if the goods have been advertised as being for sale at the auction (d). It is therefore not easy to see why it should be actionable for a seller to withdraw them before accepting a bid, even if they have been put up for sale.

Transfer of the property.—On the fall of the hammer, the offer is accepted and the goods (if specific) become the property of the buyer (e). This is so even if there is a condition of sale that they are not to be removed before payment, and such a condition does not prevent the buyer, to whom a lot has been knocked down, from re-selling the goods forthwith (f). And even if there is a condition that the goods shall be taken away and paid for within a given time, and upon failure of the buyer to comply with that condition they shall be re-sold, the buyer may still be sued for the price, and cannot claim that the goods must be re-sold, and the difference between the contract price and the re-sale price alone be charged against him (g).

This rule, however, that the contract is completed by the fall of the hammer is subject to the provisions of sub-section (5). Where a sale is notified to be subject to a reserved price, the bidding and acceptance of a bid are subject to the condition that the reserved price has been reached.

(b) *Johnston v. Boyes* (1899) 2 Ch. 73, 77. "A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated.... The plaintiff is not suing on a contract to purchase land: she is suing simply because her agent, in breach of the first and second conditions of sale, was not allowed to sign a contract which would have resulted in her becoming the purchaser of the land. I think this conclusion results from the decision of the Exchequer Chamber in *Warlow v. Harrison* (1859) 1 E. & E. 309." Per Cozens-Hardy, J. It may perhaps be objected that in strictness the owner does not offer

property for sale by auction but merely invites offers to buy: and the Act is in conformity with this view, or at any rate is not inconsistent with it.

(c) *Fenwick v. Macdonald* (1904) 6 F. (Court of Session), 850.

(d) *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286.

(e) *Sweeting v. Turner* (1871) L. R. 7 Q. B. 310; *Shankland v. Robinson & Co.* (1920) S. C. (H. L.) 103; cf. *Saint v. Pilley* (1875) L.R. 10 Ex. 137 (fixtures).

(f) *Scott v. England* (1844) 2 D. & L. 520, 69 R. R. 868.

(g) *Robinson, Fisher & Harding v. Behar* (1927) 1 K. B. 513, cf. s. 54 and notes thereto.

If the goods are knocked down to a bidder at a price below the reserved price, there is no enforceable contract, for a conditional acceptance of a conditional offer cannot amount to a binding contract (*h*).

In England owing to the operation of the Statute of Frauds, where the value of the goods sold exceeds £10, there must, in order that the contract may be enforceable against the seller and buyer respectively, be a memorandum of it signed by the seller and buyer, or their agent, and the auctioneer, in the case of a sale by auction, has the implied authority of both seller and buyer to sign the memorandum. In India, however, apart from any express conditions, this is not necessary and the contract is enforceable against both as soon as the buyer's offer is accepted (*i*).

Seller cannot bid unless the right to do so is reserved.—It was the rule at common law that if the seller bid, or employed others to bid for him, without reserving the right to bid, the buyer could avoid the sale (*j*). This rule was embodied in section 123 of the Indian Contract Act, which is reproduced by sub-section (6) of this section, though in view of the provisions of sub-section (4) it appears to be scarcely necessary. Formerly there was a different rule in equity as to sales of land, though its extent was not precisely settled. In 1867 the rule of equity was practically assimilated by statute (*k*) to that of the common law. The details of this odd little discrepancy, in which we find common law stricter on a question of fraud than equity, seem to be of no interest in India. Any curious reader therefore is referred to the English textbooks (*l*). Fixing a reserved price is not the same as reserving a right to bid. The mere fact that a reserve is fixed does not entitle a seller to bid (*m*).

Remedy of the buyer if seller bids improperly.—It would appear that the Act only enables the buyer to treat the sale as fraudulent: and this contemplates that he has become the buyer. It does not, for instance, do what the plaintiff claimed should be done in the case of *Warlow v. Harrison* (*n*). There the seller, after the plaintiff had bid sixty guineas for a horse, bid sixty-one for it, and the horse was knocked down

(*h*) *McManus v. Fortescue* (1907) 2 K. B. 1, C. A.

(*i*) It will be observed that in *Johnston v. Boyes*, *supra*, note (*b*) (which was a case of sale of land) the lot had been actually knocked down to the plaintiff, and the complaint was that the auctioneer refused to sign the memorandum. As in the case of sale of goods in India this position would not arise, this may be a reason for not extending to India the somewhat speculative doctrine advanced in that case.

(*j*) *Thornett v. Haines* (1846) 15 M. & W. 367, 71 R. R. 714 (recovery of deposit); *Green v. Baverstock* (1863) 14 C.B.N.S. 204, 135 R. R. 657.

(*k*) The Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48) commonly known as the Puffer's Act. See Pollock on Contract, 460-461.

(*l*) Pollock on Contract, 460-461; Chalmers, p. 141.

(*m*) *Gilliat v. Gilliat* (1869) L. R. 9 Eq. 60.

(*n*) (1859) 1 E. & E. 295, 309, 117 R. R. 219.

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to him. The plaintiff claimed (*inter alia*) that he should be treated as the buyer, but this claim failed: and it would also fail under the Act. Nor is it clear that the buyer can if the goods are knocked down to him treat the sale as subsisting and keep the goods but claim damages from the seller, as in an action of deceit. As far as can be ascertained at common law no such action was brought, but the buyer simply avoided the contract, either by suing for any money paid under it or resisting an action for the price (o).

Only one person may be employed to bid for the seller.—It will be noticed that only one person may bid on behalf of the seller; for “all the cases, both at law and in equity, agree in this, that if more persons than one are employed to bid, that amounts to fraud, as only one is necessary to protect the property, and the employment of more can only be to enhance the price, and therefore renders the sale void” (p). The Act, however, does not require that that person should only bid once. Nor is the seller responsible if others, who are interested in the sale, make fictitious bids without his privity (q).

“Knock-outs.”—A combination between intending bidders to refrain from bidding against each other, commonly known as a knock-out, has been held not to be illegal at common law (r), and the same rule applies in India (s). In England the position has been modified by the Auctions (Bidding Agreements) Act, 1927, (17 & 18 Geo. 5 c. 12).

Authority of the auctioneer.—An auctioneer has implied authority to sign a contract on behalf of both buyer and seller (t), an authority which does not, however, extend to his clerk (u).

The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction (v).

(o) Cf. *Green v. Baverstock*, *supra*, note (j), at p. 206. “I think the secret employment of a puffer is evidence of fraud; capable, of course, of being rebutted. If, for instance, the party after being informed of the fact, elects to treat the sale as a valid sale, the fraud is condoned,” Erle, C.J., *in arguendo*.

(p) *Thornett v. Haines* (1846) 15 M. & W. 367, at p. 372; *Mortimer v. Bell* (1865) L. R. 1 Ch. App. 10 (auctioneer and seller's agent both bidding).

(q) *Union Bank v. Munster* (1887) 37 Ch. D. 51 (mortgagor making fictitious bids without the privity of the mortgagee, who was the seller).

(r) *Rawlings v. General Trading Co.*

(1921) 1 K. B. 635, C. A.

(s) *Jyoti v. Jhormull* (1909) 36 Cal. 134, 1 I. C. 784; *Hari v. Naro* (1893) 18 Bom. 342; *Doorga Singh v. Sheo Pershad Singh* (1889) 16 Cal. 194; *Mahomed Meera Ravuthar v. Savvasi Vijaya Gopalar* (1899) 27 I. A. 17; cf. *Ma E Mya v. U Pe Lay* (1925) 3 Rang. 281, 90 I. C. 958, (26) A. R. 65.

(t) *Emmerson v. Heelis* (1809) 2 Taunt. 38, 11 R. R. 520; *White v. Proctor* (1811) 4 Taunt. 209, 13 R. R. 580. But see *Bartlett v. Purnell* (1836) 4 A. & E. 792, 43 R. R. 494.

(u) *Bell v. Balls* (1897) 1 Ch. 663; cf. *Sims v. Landray* (1894) 2 Ch. 318.

(v) *Mews v. Carr* (1856) 1 H. & N. 484, 108 R. R. 683.

An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him (*w*) but he may take a cheque in payment of the deposit according to the usual custom (*x*). Authority to sell by auction does not imply any authority to sell by private contract, in the event of the public sale proving abortive, though the auctioneer may be offered a price in excess of the reserve (*y*). Nor has an auctioneer implied authority to rescind a contract of sale made by him (*z*) or warrant goods sold (*a*); nor to deliver goods sold except on payment of the price, or to allow the buyer to set-off a debt due to him from the seller (*b*).

The contract between the auctioneer and the buyer.—An auctioneer may, like any other agent, by not disclosing the fact that he is an agent, render himself liable to be treated as a principal by the buyer, and in such a case his position will be that of a seller of the goods. Such cases, however, are rare and usually it is known that he is an agent, though his principal may not be disclosed. Most commonly, also, in the case of a sale of goods by auction, the goods are specific and are entrusted to him to sell. In that case he has a lien on the goods for his charges and expenses, and his possession of the goods is coupled with an interest in them, and, moreover, he has a special property in the goods. He is therefore entitled to sue for the price of the goods, nor is the position altered by the fact that the sale takes place on the owner's premises or his name is disclosed at the time of the sale (*c*). Nor does he lose the right to sue for the price by allowing the buyer to remove the goods before payment, for he has a lien on the proceeds of the sale as well as upon the goods (*d*). The buyer therefore cannot set-off against him any debt

(*w*) *Williams v. Evans* (1866) L.R. 1 Q. B. 352.

(*x*) *Farrer v. Lacey* (1885) 31 Ch. Div. 42.

(*y*) *Daniel v. Adams* (1764) Ambl. 495; *Marsh v. Jelf* (1862) 3 F. & F. 234, 130 R. R. 836.

(*z*) *Nelson v. Aldridge* (1818) 2 Stark. 435, 20 R. R. 709.

(*a*) *Payne v. Leconfield* (1882) 51 L. J. Q. B. 642.

(*b*) *Brown v. Staton* (1816) 2 Chit. 353, 23 R. R. 750.

(*c*) *Williams v. Millington* (1788) 1 Hy. Bl. 81, 2 R. R. 724; *Manley & Sons, Ltd. v. Berkett* (1912) 2 K. B. 329, 333; cf. *Freeman v. Farrow* (1886) 2 T.L.R., 547, where the auctioneer was held entitled to sue for the price of the goods sold on his premises though the owner himself effected the sale.

(*d*) The cases of *Coppin v. Walker*

(1816) 7 Taunt. 237, 17 R. R. 505 and *Coppin v. Craig*, 7 Taunt. 243, 17 R. R. 508, which appear to be in conflict with this proposition, are very peculiar, and badly reported; and their authority has been much shaken if not entirely overthrown: see *Isberg v. Bowden* (1853) 8 Ex. 852, 858-9; *Robinson v. Rutter* (1855) 4 E. & B. 954, 955, 957, 99 R. R. 849. The pleadings in the first of those cases are not set out, and it is not possible therefore to say with precision what the issue was, while in the second, apparently, there was a special plea that the plaintiff (the auctioneer) was suing as trustee for the owner, which is capable of meaning that his charges had been satisfied and that he was bound to hand over the amount sued for to the owner, against whom the defendant had a set-off: and the validity of the plea in law was not questioned by demurrer.

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due to the buyer from the owner except in so far as the amount sought to be set-off exceeds the auctioneer's interest (e). This usually represents the auctioneer's charges and expenses, but by special agreement between the owner and the auctioneer it may be increased to cover other debts due from the owner to the auctioneer, and also an obligation incurred by the auctioneer to pay other creditors of the owner in pursuance of an agreement to which the owner, auctioneer and those creditors are parties (f). Similarly the buyer cannot plead payment to the owner in answer to an action for the price by the auctioneer (g). Even an express agreement between the owner and the buyer that the latter may set-off the price of the goods bought against a debt due to him from the owner will not affect the auctioneer's position unless he has notice of and assents to it (h), though if, and in so far as, the auctioneer's interest is satisfied, such an agreement may be pleaded as a defence to an action by the auctioneer (i).

The liabilities of the auctioneer.—There is therefore a contract between the auctioneer and the buyer, but probably it is not a contract of sale in the full sense of the term, but a contract made with the auctioneer on his own account with the buyer. Under it the auctioneer incurs certain liabilities but not the full liabilities of a seller: though the precise extent of those liabilities must depend on the facts of the case. He warrants his authority to sell on behalf of his principal (j) and also that he knows of no defect in his principal's title (k), and probably, even apart from express agreement, he undertakes to give the purchaser possession of the goods on payment of the price into his hands and that such possession shall not be disturbed by his principal or himself (l). Perhaps also, if he has not disclosed his principal and the sale is not announced as being subject to a reserved price, he warrants that he has authority to sell without reserve. This, however, is by no means

(e) *Manley & Sons, Ltd. v. Berkett* (1912) 2 K. B. 329; *Holmes v. Tutton* (1855) 5 E. & B. 65, 103 R. R. 367. It may be that the right of set-off is equitable only, and did not exist at law, but this is a matter which to-day is of no practical interest.

(f) *Manley & Sons, Ltd. v. Berkett*, *supra*.

(g) *Robinson v. Rutter* (1855) 4 E. & B. 954, 99 R. R. 849.

(h) *Manley & Sons, Ltd. v. Berkett*, *supra*.

(i) *Grice v. Kendrick* (1870) L.R. 5 Q. B. 340. Needless to say, the auctioneer may, by assenting, either expressly or impliedly, to such an agreement, waive his own rights.

Perhaps this is the explanation of the cases of *Coppin v. Walker* and *Coppin v. Craig*, *supra*, note (d), but this cannot be said with any certainty. Also, if the owner is suing, any set-off or special arrangement between him and the buyer may be pleaded against him; *Barlett v. Purnell* (1836) 4 Ad. & E. 792, 43 R. R. 484.

(j) *Anderson v. Croall & Sons, Ltd.* (1904) 6 F. 153 (Court of Session) in which case the auctioneer purported to sell goods which the owner had not authorized him to sell; *Benton v. Campbell Parker & Co.*, *infra*, next note.

(k) *Benton v. Campbell Parker & Co.* (1925) 2 K. B. 410, 415.

(l) *Ib.*, 416.

free from doubt (*m*). It has also been said that the auctioneer has ostensible authority to sell without reserve, and if after a bid is accepted the seller sets up a restriction of the auctioneer's authority which was not disclosed at the time, the buyer's remedy is not against the auctioneer for breach of warranty of authority, but against the seller on the contract of sale (*n*), but this proposition has been questioned by the Court of Appeal (*o*).

He may therefore be liable to the buyer if he fails to deliver or put the buyer in possession of the goods (*p*), but if he does so he has completed his contract; and it would seem that he does not warrant his principal's title to the goods (*q*).

If, however, before the price is paid, the true owner of the goods claims them from the buyer, the auctioneer cannot recover the price, even if the buyer has taken the goods away under an express promise to pay for them (*r*), and presumably if the price, or any part of it, has been paid to the auctioneer and the money still remains in his hands, the buyer may recover it from him in an action for money had and received.

If the buyer avoids a sale by reason of any contravention of the provisions of sub-sections (3) and (4), he may resist an action for the price by the auctioneer, and also recover the deposit from him, and, if the auctioneer has been a party to the fraud, with interest (*s*).

The auctioneer's rights and liabilities in relation to third parties.—The auctioneer by virtue of his lien and special property in the goods may maintain trespass or trover against a person who wrongfully interferes with them (*t*). Conversely if he sells goods which in fact belong to a third person without that person's authority he may be guilty of conversion, and is so guilty if he delivers the goods with intent to pass the property in them to the buyer (*u*). He will, however, be entitled to

(*m*) *Warlow v. Harrison* (1859) 1 E. & E. 295, 309. But see the comments on this case in *Mainprice v. Westley* (1865) 6 B. & S. 420, 141 R. R. 452; cf. Pollock and Mulla, p. 52.

(*n*) *Rainbow v. Hawkins* (1904) 2 K. B. 322. In that case the claim against the auctioneer for damages for failure to deliver failed owing to their being no note or memorandum in writing of the agreement, a defence which would not prevail in India. The question of breach of warranty therefore is of less importance in India than in England.

(*o*) *McManus v. Fortescue* (1907) 2 K. B. 1, C. A.

(*p*) *Franklyn v. Lamond* (1847) 4 C. B.

637; *Woolfe v. Horne* (1877) 2 Q. B. D. 355; *Rainbow v. Hawkins*, *supra*.

(*q*) *Wood v. Baxter* (1883) 49 L. T. 45; *Salter v. Woollams* (1841) 2 Man. & G. 650, 58 R. R. 513; *Payne v. Eladen* (1900) 17 T. L. R. 161; *Benton v. Campbell Parker & Co.* (1925) 2 K. B. 410.

(*r*) *Dickenson v. Naul* (1833) 4 B. & Ad. 638, 72 R. R. 671.

(*s*) *Thornett v. Haines* (1846) 15 M. & W. 367, 71 R. R. 714; *Heatley Newton* (1881) 19 Ch. Div. 326, C. A.

(*t*) *Williams v. Millington* (1788) 1 Hy. Bl. 81, 85, 2 R. R. 724.

(*u*) *Consolidated Co. v. Curtis* (1892) 1 Q. B. 495, reviewing the authorities.

**Se.
64, 64A**

an indemnity from the person who employed him to sell the goods under the provisions of section 223 of the Indian Contract Act (v). It appears, however, that if the auctioneer does no more than arrange the price, and never actually interferes with the goods, or merely delivers them in pursuance of a contract actually made between the seller and the buyer, he is not guilty of conversion (w).

64A. In the event of any duty of customs or excise on any goods being imposed, increased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time,—

In contracts of sale amount of increased or decreased duty to be added or deducted.

- (a) If such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and
- (b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction (x).

Section 10 of the Indian Tariff Act, 1934 (XXXII of 1934) was repealed and re-enacted in the Indian Sale of Goods Act. Having regard to the preamble of the Indian Tariff Act, sec. 10 was open to the construction that it applied to customs duties only on goods imported into or exported from British India and did not refer to goods produced in India

(v) Pollock and Mulla, pp. 594-595.
 (w) *National Mercantile Bank v. Rymill* (1881) 44 L. T. 767, C.A.; *Cochrane* v. *Rymill* (1879) 40 L. T. 744, 746, C.A.
 (x) Section 2, Act 41 of 1940.

on which excise duty was paid. In order, however, to make the section applicable to such goods, it was repealed and re-enacted in the Sale of Goods Act by section 2 of the Indian Sale of Goods (Amendment) Act, 1940 (XLI of 1940) section 3 of which Act is as follows :—

**Sa.
64A, 65**

“ 3. (1) Section 10 of the Indian Tariff Act, 1934, is hereby

Repeal of section 10 of Act XXXII of 1934. repealed.

(2) Nothing in the repeal effected by sub-section (1) shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or
- (c) anything done or suffered before the commencement of this Act.”

65. Chapter VII of the Indian Contract Act, 1872, is hereby repealed (y).

Principles of construction.—The English Act, on which this Act is based, was a codifying act, and the rules for construing such an Act have been thus stated by Lord Herschell (z). “ The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. . . . I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely ; they, of course, do not exhaust the category. What, however, I am

(y) Repealed by Repealing Act, 1938 (1 of 1938), S. 2 and Sch.

(z) *Bank of England v. Vagliano Brothers* (1891) A. C. 107, 144-145.

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venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

The Act, however, is expressed to be one "to define and amend" the law relating to the sale of goods, and the provisions of section 3 indicate that it does not do so exhaustively, and it repeals the statutory provisions which hitherto have governed the law with which it deals.

As to repealed provisions, it has been said that it is hazardous to refer to such as have been absolutely repealed to ascertain what the Legislature meant to enact in their room and stead, and if the words of the new statute are capable of being interpreted without such foreign aid, it is not proper to examine the enactments of statutes no longer existing for the purpose of imposing upon those words a meaning which, taken by themselves, they do not bear (a). And a decision of a Court under an earlier statute does not bind a Court when construing a later statute (b).

But the provisions of the repealed chapter and the construction which they have authoritatively received may be taken into account for certain purposes. If, for instance, words have received authoritative interpretation and are repeated without alteration, it may be presumed that the Legislature has adopted that interpretation (c); for speaking generally, it may be taken that the Legislature uses the same language in the same sense when dealing at different times with the same subject. A change of language, therefore, is some indication of a change of intention, but this is by no means a necessary conclusion (d). Where, however, a limited interpretation has been placed upon the repealed provision, and the words have been enlarged, it is a legitimate inference that the enlargement was intended by the Legislature (e); conversely where the words of the repealing Act appear to be narrower than those of the repealed Act, the change may be presumed to be intentional.

Such matters, however, are but elements to be taken into consideration: for in the end the words of the existing Act alone have to be dealt with. In this instance this is emphasized by the fact that no illustrations are given to the different sections.

(a) *Bradlaugh v. Clarke* (1883) 8 App. Cas. 354, 380, per Lord Watson.

(b) *Ex parte Blaiberg, In re Toomer* (1883) 23 Ch. D. 254, 258, per Jessel, M. R. "I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the

former Act."

(c) *Mansell v. The Queen* (1857) 8 E. & B. 54, 73.

(d) See *Holliday & Greenwood, Ltd. v. District Surveyors Association* (1914) 2 K. B. 803, 814, 815.

(e) *Hurlbutt v. Barnett & Co.* (1893) 1 Q. B. 77, 78, 79, C. A., per Lord Esher, M. R.

66. (1) Nothing in this Act or in any repeal effected **S. 66**
Savings. thereby shall affect or be deemed to affect—

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or
- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to the sale of goods which is not expressly repealed by this Act, or
- (e) any rule of law not inconsistent with this Act.

(2) The rules of insolvency relating to contracts for the sale of goods shall continue to apply thereto, notwithstanding anything contained in this Act.

(3) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge or other security.

Sub-section 1.—Paragraphs (a) to (c) of this sub-section merely indicate that the Act is not retrospective : and even without such express provisions, an Act is not construed as retrospective unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction (f).

Paragraph (d) saves the provisions of such enactments as the Indian Merchant Shipping Act, 1923, and the Code of Civil Procedure, 1908, which contain special provisions relating to the sale of goods.

Paragraph (e) really provides for the contingency of *lacunæ* in the Act.

Sub-section 2.—The Acts now in force in British India relating to Insolvency are The Presidency Towns Insolvency Act (III of 1909) ; The Provincial Insolvency Act (V of 1920) ; The Companies Act, Part V : and see also Order 22, r. 8, of the Code of Civil Procedure, 1908.

Sub-section 3.—Mortgages, pledges, charges, etc., are dealt with by the Transfer of Property Act and sections 172-179 of the Indian Contract Act.

(f) *Lauri v. Renad* (1892) 3 Ch. 402, 421, C. A.

APPENDIX I.

Provisions of the English Statutes relating to contracts of sale for £ 10 and upwards.

The Statute of Frauds (29 Car. 2, c. 3).

SEC. 17.—“ And from and after the said four and twentieth day of June [1677] no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

The Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), commonly called Lord Tenderden's Act.

SEC. 7.—“ Be it enacted, that the said enactments (a) shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery.”

The Sale of Goods Act, 1893 (56 and 57 Vict. C. 71) (b).

SEC. 4.—

- (1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.
- (2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.
- (3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.
- (4) The provisions of this section do not apply to Scotland.

(a) *i.e.*, The Statute of Frauds, s. 17, | (b) This Act repeals the two previously
and the corresponding Irish provision. | cited enactments.

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Act No. IX of 1932.

(Passed by the Indian Legislature).

(Received the assent of the Governor-General on April 8, 1932.)

An Act to define and amend the law relating to partnership.

WHEREAS it is expedient to define and amend the law relating to partnership ; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. (1) This Act may be called the Indian Partnership Act, 1932.

**Sec.
1, 2**

Short title, extent and commencement. (2) It extends to all the Provinces of India, including the Sonthal Parganas.

(3) It shall come into force on the 1st day of October, 1932, except sec. 69, which shall come into force on the 1st day of October, 1933.

2. In this Act, unless there is anything repugnant Definitions. in the subject or context :—

- (a) an “ act of a firm ” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm ;
- (b) “ business ” includes every trade, occupation and profession ;
- The definition of “ business ” is not exhaustive. “ Business ” would include a single commercial adventure (a).
- (c) “ prescribed ” means prescribed by rules made under this Act ;
- (d) “ third party ” used in relation to a firm or to a partner therein means any person who is not a partner in the firm ; and

(a) *Re Abenheim* (1913) 109 L. T., at 256, (1940) A.L.J. 179, A.I.R. 1940 All. p. 220 ; *Nathi Lal v. Sri Mal* (1940) All. 230 does not appear to be good law.

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- (e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act.

3. The unrepealed provisions of the Indian Contract Act, 1872, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms.

Application of provisions of Act IX of 1872.

History of Partnership Law.—The present Act repeals (sec. 73) and supersedes Ch. XI. of the Contract Act. It makes considerable changes in definition and arrangement, gives effect (but short of making the firm a legal person) to the mercantile view of a firm's continuity and adds provisions for voluntary registration of firms. It nearly doubles the length of the repealed chapter, but the law thus expanded in statement is not much altered in substance.

Our modern law of partnership was built up, in the course of less than a century, by judicial decisions, to which legislation added next to nothing; and the great majority of these decisions were in Courts of Equity. The Commission which framed the original draft of the Contract Act included Lord Romilly, for many years Master of the Rolls, and Sir William James, Vice-Chancellor, and afterwards Lord Justice, who was second only to Jessel among modern equity lawyers. Hence the chapter on Partnership is perhaps the best in the Act. Comparison with the English Act of 1890 (b) will show that it was of great use to the English draftsman of the digest which ultimately became the groundwork of that Act. It is possible that the Indian Law Commissioners might have done better if they had been less brief; but they did very well, and almost the only thing to be regretted about this part of their work is that they were so sparing of illustrations, which in this subject would have been particularly appropriate. But for some reason which does not appear there are no illustrations at all in the present Act. It may be that Indian pleaders, in subordinate jurisdictions at any rate, are tempted to regard illustrations as a kind of sacred text and build ingenious but futile distinctions on minute scrutiny of their language. It is obvious that illustrations used in that manner are likely to do more harm than good.

Lord Lindley's statements of English judicial practice are sometimes cited in the following commentary without further reference to authority. For all purposes, except that of being technically binding on the Court (which English decisions themselves are not in India), they carry at least as much weight as most reported judgments.

(b) For the history of the English codification, see the Preface to Pollock's Digest of the Law of Partnership.

CHAPTER II.

THE NATURE OF PARTNERSHIP.

4. "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

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Definition of: "partnership", "partner", "firm" and "firm name."

Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm," and the name under which their business is carried on is called the "firm name."

Partnership.—The definition of partnership now substituted for the condensed version of Kent's which stood in the Contract Act reproduces with slight verbal alteration, a suggestion made long ago by Sir F. Pollock. His purpose then was to meet an objection of Sir G. Jessel's, which however seemed to him rather captious (*c*), to the effect that persons may be partners who do not in fact bring any property, labour or skill to the common undertaking, such as a deceased partner's widow admitted under a provision in the partnership articles. The answer in that case appears to be that the share acquired by her is none the less hers for being given to her.

The verbal amendment in the text consists in writing "acting for all" in place of "on behalf of all," the intention being "to bring out more nearly the fundamental principle that the partners when carrying on the business of the firm are agents as well as principals," as explained in the Special Committee's report on this section. There is English judicial authority for such phrases as "on behalf of" and "on the account of," and moreover there is no such grammatical ambiguity in the words "on behalf of" as the Special Committee seems to have assumed. The Oxford English Dictionary points out *s.v.* Behalf that they do carry the meaning of agency. When the sense is only "in the interest of" or "for the benefit of," the proper idiomatic expression is "*in* behalf of." But this distinction may be too fine to be generally known and observed outside English-speaking countries.

It will be observed that the present section is confined, as a definition ought to be, to stating the attributes which are necessary and sufficient to identify any particular example as a member of the class defined. Cautions, qualifications and exceptions which have to be attended to in applying the general conception are properly left to come afterwards. The fault of including too much is easy to commit, and has been committed by several

(c) Pollock, *Digest of the Law of Partnership*, 12th ed., p. 5.

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of the authors whose definitions are collected in the first chapter of Lindley's treatise. One typical mistake is to add words about the object being lawful. It is not correct to say or imply that partnership entered into for an unlawful purpose or purposes of which some are unlawful is not a partnership at all. One might as well say (contrary to the very definition of larceny in English law) that a thief has not possession of the thing stolen.

To bring out all the implications is just what a definition ought not to aim at. The Special Committee's own comment on the definition is as follows :—

“The definition of ‘partnership’ contains three elements :—

- (1) There must be an agreement entered into by all the persons concerned ;
- (2) the agreement must be to share the profits of a business ; and
- (3) the business must be carried on by all or any of the persons concerned, acting for all.

All these elements must be present before a group of associates can be held to be partners. These three elements may appear to overlap, but they are nevertheless distinct. The first element relates to the voluntary contractual nature of partnership ; the second gives the motive which leads to the formation of firms, *i.e.*, the acquisition of gain ; and the third shows that the persons of the group who conduct the business do so as agents for all the persons in the group, and are therefore liable to account for all.”

The definition of Partnership and the illustrations were as follows in the Contract Act, sec. 239 (d).

“Partnership” is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits there- of between them.

“Partnership” defined.

Persons who have entered into partnership with one another are “Firm” defined. called collectively a “firm.”

(d) It has been observed that the present section has the effect of widening the definition of Partnership, as originally under sec. 239 of the Indian Contract Act it was *inter alia* necessary to agree to combine property, labour and skill; *Birdichand v. Harakchand* (1940) 190 I. C. 613, A. I. R. 1940 Nag. 211.

(The business must be in existence. An agreement to carry on business in future will not result in a partnership until that date arrives. The relations *inter se* among promoters of a company are different from relations among partners); *Sarna v. Reuben*, 21 Luck. 285, (1940) A.O. 68.

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(a) *A* and *B* buy 100 bales of cotton, which they agree to sell for their joint account. *A* and *B* are partners in respect of such cotton (e).

(b) *A* and *B* buy 100 bales of cotton, agreeing to share it between them. *A* and *B* are not partners.

(c) *A* agrees with *B*, a goldsmith, to buy and furnish gold to *B*, to be worked up by him and sold, and that they shall share in the resulting profit or loss. *A* and *B* are partners.

(d) *A* and *B* agree to work together as carpenters, but that *A* shall receive all profits and shall pay wages to *B*. *A* and *B* are not partners.

(e) *A* and *B* are joint owners of a ship. This circumstance does not make them partners.

The illustrations are elementary, and the abrogation of their legislative authority must not be supposed to cast any doubt on their correctness. Kent's definition, which the framers of the Contract Act condensed as above, was as follows: "Partnership is a contract of two or more competent persons to place their money, effects, labour and skill, or some or all of them, in lawful commerce or business, and to share the profit and bear the loss in certain proportions." (Comm. iii 23.) It seems to go back to a passage of Pufendorf's, which may be seen in the two pages of definitions of various degrees of merit and authority collected in the first chapter of Lindley's treatise. The last clause is misleading, for specification of the shares in which profits are to be divided is not necessary.

All this however is now merely matter of curiosity.

The definition which stands in the English Act, "The relation which subsists between persons carrying on a business in common with a view of profit," appears to be founded on the following dictum (certainly not intended to be a formal definition) of the Judicial Committee in an Indian case decided on the analogy of English law: "To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common" (f). It will be observed that this definition does not mention sharing as distinguished from making profits; and it has been suggested that in England persons may be partners in an undertaking carried on by them in concert without aiming at personal gain, or even on the express terms that none of them shall derive any individual profit from it, and that the object of dividing profits, though almost always important in fact, "points to the conclusion that it is rather an accident

(e) *Birdichand v. Harakchand* (1940) 190 I. C. 613, A. I. R. 1940 Nag. 211.

(f) *Moltwo, March & Co. v. Court of Wards* (1872) L. R. 4 P. C. 419, 436;

Supp. Vol. I. A. 86; 10 B. L. R. 312, 320, on appeal from (1869) 3 B. L. R. A. C. 238.

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than of the essence of the partnership relation" (g). It is clear that this opinion did not occur to Kent, or Story, or the framers of the Contract Act, or Sir George Jessel, who said that partnership is at all events a contract for the purpose of carrying on a business bringing profit, and dividing the profit in some shape or other between the partners (h). Not only a common business, but a common interest in it is essential (i).

This over-ingenuous suggestion of Lindley's editors has not been the subject of judicial comment and quite probably never will be. In any case it is clearly excluded by the present as well as the former Indian definition. As regards the external relations of partnership firms, the most material element is the authority of every partner to act for the whole. This is a necessary attribute of partnership (how far it can be modified by special terms in the partnership we shall see later).

A similar authority might conceivably exist in an association for some special purpose of persons not being partners. But in any such case its existence would have to be distinctly proved, and one may guess that strict proof would be required, whereas, if the fact of partnership is once established, this double capacity of principal and agent is presumed in every member.

As to the relation being between persons, any person generally competent to contract may make this as well as other kinds of contracts, and there is no reason in law why a corporate body, such as a joint-stock company, should not be a partner with either natural or corporate fellow-partners, provided that this is not forbidden by its own particular constitution. Before the Great War an English and a German incorporated company were trading in partnership; the fact appears in the reports only because, after that relation was automatically determined by the outbreak of war, a question arose as to the disposal of profits made by the English company's continued use of the German company's capital after the dissolution (j). It is more usual, however, for companies to work together by means of joint boards or committees without any formal combination. Railway companies have done this in England on a large scale, and similar arrangements are well known in banking business. Partnership between a corporation and an individual does not seem to be convenient as a business arrangement or to occur in practice. In truth, the law and practice of partnership business are so well settled that the verbal definition matters little except for the instruction of elementary students.

(g) Lindley, p. 10, in editorial addition.

(h) *Pooley v. Driver* (1876) 5 Ch. D. 458, 472, 473.

(i) *Cp. Ambadas v. Kasabai* (1925)

89 I. C. 283, A. I. R. 1925 Nag. 436.

(j) *Hugh Stevenson & Sons v. Aktien-gesellschaft für Cartonnagen-Industrie* [1918] A. C. 239.

Obviously there must be two or more persons before there can be a partnership. A person cannot be a partner in his individual capacity as also in a representative capacity. A person cannot be a partner with a wakf, as a wakf is not a *persona* (k).

If all the requisites of a partnership are present, the fact that one or some of the partners are to have the sole control of management and are empowered by the terms of the deed to determine the partnership does not negative the idea of partnership (l). An agreement of partnership need not be express but can be inferred from the course of conduct of the parties to the agreement (m). If, however, the parties to an agreement have not agreed to the date of the commencement of the partnership, it cannot be said that they have become partners (n).

Co-ownership and partnership.—There is not partnership without combination to carry on a business, and therefore the mere fact that persons own in common something which produces returns, and divide those returns according to their respective interests, does not make them partners. "Persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them" (o). No one ever suggested that co-owners of a house let to a paying tenant, for example, are partners, either as to the house or as to the rent. Their shares are distinct, independent and separately alienable. If they used the house as an hotel managed by themselves or their agent for their common profit, they would be partners in the business of hotel-keeping (p). Property may even be acquired in common in order to make profit of it without creating a partnership. If A, B and C agree to buy land on joint account, and for interests proportioned to their contributions, and to form a company to take it over and use it for profit, this will not make them partners; A, B and C have distinct shares in the property, uncontrolled except by the specific agreement, and if the company is formed and buys the land, each of them will be separately entitled to the price of

(k) *Hossen Kasam v. Commissioner of Income-tax* (1937) 2 Cal. 160, 41 C. W. N. 629.

(l) *In re Ambalal Sarabhai* (1923) 25 Bom. L. R. 1225, 77 I. C. 699, A. I. R. 1924 Bom. 182.

(m) *Haji Isa v. Saru Bai*, 177 I. C. 831, A. I. R. 1938 Nag. 324; *Tajammul Hussain v. Ahmad Ali* (1937) 167 I. C. 839, A. I. R. 1937 Oudh 438.

(n) *Shardaprasad Gokul Prashad v. Nomanbhai Shamsuddin*, 19 N. L. J. 306, 169 I. C. 95, A. I. R. 1937 Nag. 68.

(o) *James, L.J. in Smith v. Anderson* (1880) 15 Ch. Div. at p. 275; *Govindan Nair v. Nagabhusanammal* (1948) A.M.

343.

(p) This needs no authority, but *French v. Styring* (1857) 2 C.B.N.S. 357, 109 R.R. 716 may be referred to; see per Willes, J., 2 C.B.N.S., at p. 336, 109 R.R. 722. Similarly, joint money-lenders are partners. *Mulchand v. Tarachand*, 116 I.C. 646, A.I.R. 1929 Nag. 137; *Gokuldas v. Kesheorao* (1937) Nag. 358, 169 I.C. 855, A.I.R. 1937 Nag. 134. Co-ownership of land does not constitute a partnership between the co-owners but the co-owners may work the land in partnership: *Chettyar Firm v. Chettyar Firm* (1933) 144 I.C. 1007, A.I.R. 1933 Rang. 120.

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his share (q). If they had started the proposed business on the land on their own account instead of selling to the company, they would have been partners, though the land would be partnership property only if they originally acquired it for the purpose of the joint business, or expressly agreed to bring it into the partnership stock. An agreement which is in effect for the acquisition of property in shares, and leaves the parties to do severally what they please with it, will not be made a partnership even by the use of that word (r).

As to ships in particular, it has long been settled that part owners of a ship are not necessarily partners (s); but if they employ the ship in trade or adventure on their joint account, they are partners as to that employment and the profit thereby made (t).

Where persons enter into an agreement constituting a partnership limited to a joint trading adventure, and goods are purchased, ostensibly by an individual adventurer but really for the purpose of the joint adventure, the adventurers are liable as partners; but there is no such responsibility for goods purchased before the partnership agreement upon the credit of an individual adventurer, though they are afterwards brought into stock as his contribution to the joint adventure (u).

Since the fact that several persons are co-owners of a ship does not make them partners, a suit by one co-owner against another for his share of the sale proceeds of the ship and the profits earned by the ship before sale is not such a winding up suit as is contemplated in Ch. VI of this Act (v). But "cases may sometimes occur in which a partnership exists between persons owning a ship, and the ship may be part of the assets of the firm; but in such a case some contract of partnership exists between the parties, or some joint business is carried on by them to which owning of ships is merely accessory" (w).

Profits.—The profits contemplated by the Act, and by the common law of partnership—sometimes called "net profits"—are the excess of returns over advances, the excess of what is obtained over the cost of obtaining it (x). It was formerly common to speak of the total receipts or gross returns of a business as "gross profits." This is objectionable, and should be avoided (x). Obviously there may be very large gross returns and yet little or no real profit. Sharing gross returns will not

(q) *London Financial Association v. Kell* (1884) 26 Ch. D. 107, 143.

(r) *Abdullah v. Allah Diya* (1927) 8 Lah. 310, 100 I.C. 846, A.I.R. 1927 Lah. 333. Here not only a business carried on in common, but even a common interest is wanting. See also *In re Bai Sakinaboo* (1932) 34 Bom. L.R. 100, 137 I.C. 903, A.I.R. 1932 Bom. 116.

(s) *Helme v. Smith* (1831) 7 Bing. 709, 713, 33 R.R. 630, 633.

(t) *Green v. Briggs* (1847) 6 Ha. 395, 77 R.R. 156; *Vanamati Sattiraju v. Bollapragada Pallamraju* (1918) 41 Mad. 939, 47 I.C. 640.

(u) *Karmali v. Vora Karimji* (1915) L.R. 42 I.A. 48, 38 Bom. 261, 26 I.C. 915.

(v) *Hyder Ali v. Elahee Bux* (1882) 8 Cal. 1011.

(w) *Hyder Ali v. Elahee Bux* (1882) 8 Cal. 1013.

(x) *Lindley*, 41, 42.

create a partnership, as the English Act (sec. 2, sub-sec. 2), in affirmance of the general law, has expressly declared. The owner of a theatre lets a travelling manager and his company use the building, scenery, appliances, and permanent staff, in consideration of receiving half the money taken from spectators. This does not make the owner answerable as partner or principal for anything done by the manager which may be the subject of suits or penalties, such as infringement of dramatic copy-right (y). Similarly the author of a book receiving a royalty on copies sold is not a partner with the publisher; and it seems that he is not so even if the agreement is to divide profits, the publishers taking all risk (z).

Sharing profits.—As common interest will not make a partnership without division of profits, so sharing of profits will not unless there is really a common business. The cases enumerated in sec. 6 are only some special applications of this principle. Sharing the profits of an undertaking is not of itself a partnership, though the existence of partnership may often be inferred from it. "It is said (and about that there is no doubt) that the mere participation in profits 'inter se' affords cogent evidence of partnership. But it is now settled by the cases of *Cox v. Hickman* (a), *Bullen v. Sharp* (b), and *Mollwo, March & Co. v. Court of Wards* (c), that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive" (d). Before the decision of the House of Lords in *Cox v. Hickman* (e) it was supposed that every one who took a share in the profits of a business was liable as a partner to outside creditors, whatever might be the terms as between himself and the persons actually conducting the business. But the true test is not whether a man receives a share of profits; it is whether the business is being carried on by him

(y) *Lyon v. Knowles* (1863) 3 B. & S. 556, 5 B. & S. 751, 129 R.R. 452, 456.

(z) *Lindley*, 54; *Pollock*, 16; and see per Lord Brougham and Lord Wensleydale in *Cox v. Hickman* (1860) 8 H.L.C. at p. 277, 125 R.R. at p. 153. No one acquainted with literary business can suppose that in fact the printer, binder, etc., give credit to any one but the publisher. The relations between authors and publishers or editors really form a distinct species of contract, about which there is less authority than might be expected.

(a) (1860) 8 H.L.C. 268, 125 R.R. 148.

(b) (1865) L.R. 1 C.P. 86, Ex. Ch.

(c) L.R. 4 P.C. 419.

(d) *Jessel M.R., Ross v. Parkyn* (1875) L.R. 20 Eq. 331, 335, closely following the language of the Judicial Committee in *Mollwo, March & Co.'s* case; *Trower & Sons Ltd. v. Ripstein* (1944) 2 All. E.R. 274, P.C. (The test is the real intention of the parties. The use of the expression "sleeping partner" is not conclusive). *Hirabai v. Bhagirath* (1946) A.B. 174, (1945) Bom. L.R. 808.

(e) Note (a) above. *Mollwo, March & Co. v. Court of Wards* was essentially a similar case, in which powers of control and retaining profits, or a percentage of them, towards payment of his debt, were given to a single creditor.

S. 4 or by another on his account, so that he is a principal. Creditors who supervise the conduct of their debtor's trade, with an agreement to pay themselves off out of the profits, do not thereby become his partners (e1) and the same principle applies to trustees for debenture-holders. A receiver whom they have appointed under their powers is not their servant, and does not become so, or make them liable for his contracts, even after he has ceased, by the winding up of the company, to be the company's agent (f). The question is really one of agency and authority (g).

In the leading case in the Privy Council, where it was first clearly laid down that the question whether the relation of partnership does or does not exist, "must depend on the real intention and contract of the parties" (h), there was a contract between a partnership firm and a third person whereby it was agreed that he should receive in consideration of advances a commission on the net profits of the partnership business, and large powers of control over the business were given to him for his protection, but no power to direct transactions. This was decided to be a contract not of partnership, but of loan and security between a debtor and a creditor (i). The same principle is applied to other kinds of transactions. An agreement by A to pay Z, in consideration of his guaranteeing A, in underwriting business, a certain proportion of A's profits in that business, does not make Z a partner with A (j). Again, if a deceased partner's executors are entitled by the articles to receive his share of profits during the rest of the partnership term if he dies before its expiration, they are not thereby made partners (k). It must be remembered that (as now declared by this Act, sec. 6 below) in all cases the result depends on the real contract and intention of the parties as shown by all the facts. It is settled or highly probable that certain kinds of facts are not alone sufficient to constitute partnership. The question how much must be added to produce that result is not capable of any general answer, save that modern Courts may be expected, on the whole, to treat men as partners when and so far as a sensible man of business would consider them so.

(e1) Note (a) above. *Mollwo, March & Co. v. Court of Wards* was essentially a similar case, in which powers of control and retaining profits, or a percentage of them, towards payment of his debt, were given to a single creditor.

(f) *Gosling v. Gaskell* [1897] A. C. 575. It would seem that after that date the receiver was personally liable on contracts made by him, as having no principal who could be sued.

(g) See the comments on *Cox v. Hickman* in *Bullen v. Sharp*, note (b) above.

(h) *Mollwo, March & Co. v. Court of Wards* (1872) L. R. 4 P. C. 419, 10 B. L. R. 312, 320, on appeal from 3 B. L. R.,

A. C. 238, Supp. Vol. I. A. 86. For a simpler case of a payment proportional to profits being merely remuneration to an agent, see *Secy. of State v. G. I. P. Ry. Co.* (1924 P.C.) 49 Bom. 320, 88 I. C. 107, A. I. R. 1925 P.C. 103. A mere statement that the parties are to be partners will not necessarily constitute them partners in law: *Mamooji v. Tayebali* (1933) 146 I. C. 730, A. I. R. 1933 Sind 210.

(i) See last note.

(j) *Ex parte Tennant* (1877) 6 Ch. Div. 303.

(k) *Holme v. Hammond* (1872) L. R. 7 Ex. 218.

Clubs.—In an ordinary club the committee has no authority to pledge the credit of the members at large, and the members are not liable for debts incurred by the committee. As in such a case no single element of the contract of partnership is present, it is rather hard to see how the members can ever have been supposed to be liable as partners; but it was once thought arguable, and even said to be the common opinion (*l*).

Partnership and service.—Sometimes it is not easy to draw the line between a partnership and a payment of salary by a share of profits. The owner of a ship, who has been paying the master fixed wages, hands over the management of the ship to the master on the terms of receiving a fixed share of profits from him. Does this leave the master the owner's servant, though a servant with large discretion, or make him a partner with the owner in the adventure? Probably the latter, but either opinion is plausible (*m*).

A does in his own name the business of loading and unloading waggons for a limited company. *A* appoints *B* to manage the business. It is agreed between them that *B* shall get a 12 annas share out of the net profits as remuneration, and that *A* shall get a 4 annas share but shall not be liable for any loss. Upon these facts it was held by the High Court of Calcutta that the relation between *A* and *B* was that not of partners but of principal and agent (*n*). ?

It is even possible for *Z* both to receive a share of the profits of *A*'s business and bear a share of losses, and yet, by the special terms of their agreement, to be in the position of a servant as regards *A* and not entitled to the remedies of a partner (*o*). We do not know of any decision that a person in such a position was not liable as a partner to the creditors of the business. Conversely, receipt of a fixed salary in lieu of a share of profits is consistent with the parties being really partners if their intention to be so is otherwise apparent (*p*).

Partners and firm.—The second paragraph of sec. 4 is expanded from sec. 239 of the Contract Act by adding that the parties are called individually partners and defining the term firm-name. Doubtless the

(*l*) *Fleming v. Hector* (1836) 2 M. & W. 172, 46 R. R. 553.

(*m*) *Steel v. Lester* (1877) 3 C. P. D. 121, per Lindley, J. at pp. 127, 128. All that had to be decided was that, one way or another, the owner remained liable for the master's negligence.

(*n*) *Munshi Abdul Latiff v. Gopewar Chatteraj* (1932) 56 Cal. L. J. 172.

(*o*) *Walker v. Hirsch* (1884) 27 Ch. Div. 460.

(*p*) *Ragunandan Nanu v. Hormasjee*

Bezonjee (1926) 51 Bom. 342, 100 I. C. 1025, A. I. R. 1927 Bom. 187. Under a "memorandum of co-partnership agreement" the party who was to be "in charge of the firm" was to receive a fixed salary and commission on net profits but "get no shares of profit of the firm"; held that this meant no other share, and he was a partner; *Raghumull Khandelwal v. Official Assignee* (1923) 28 C. W. N. 34, 81 I. C. 17.

S. 4 purpose is to call attention more distinctly to the regular terms, and to confine them if possible to their proper usage. In particular "partnership" is the name of a relation between persons, and it is not good English, and may conduce to confusion of sense, to use it as their collective name instead of "firm."

One member of the Special Committee would have liked to put the conception of the Firm in the first place and define a partner as a member of a firm, and incidentally to relegate the relations between partners within the firm to a schedule of model partnership articles (analogous to Table A of the Companies Act) subject to variation by agreement: but he admitted in effect that such a radical innovation on established usage is not practicable. Fully carried out, it would involve substituting Firm for Partnership as the main title and catch-word of the subject: rather too much even for the long-suffering tribe of indexers.

By the current usage of affairs, a firm is distinct from its members. They may have claims on the firm's property, but it is not theirs. It has separate accounts, and is their debtor and creditor. Quite possibly some person who is not a member of the firm may have authority to do certain things in its name which some or one of the partners have not. In short, the firm is treated very much as if it were a corporation: it is an artificial or "moral" person for business purposes; and in some systems of law this personality receives formal acknowledgment. "In Scotland" in particular, "a firm is a legal person distinct from the partners of whom it is composed" (g), though the individual partners may be liable for its debts. But the Common Law has no means of admitting any kind of legal existence between that of a formally constituted corporation and that of an individual human being (though the procedure of courts of equity can go near it in what are called representative suits); and for English jurisprudence the firm is only a compendious name for certain persons who carry on business, or have authorized one or more of their number to carry it on, in such a way that they are jointly entitled to the profits and jointly liable for the debts and losses of the undertaking. For the purpose of determining legal rights "there is no such thing as a firm known to the law" (r) and

(g) English Partnership Act, sec. 4, sub-sec. 2. "The Indian Partnership Act goes further than the English Partnership Act, 1890, in recognising that a firm may possess a personality distinct from the persons constituting it; the law in India in that respect being more in accordance with the law of Scotland than with that of England. But the fact that a firm possesses a

distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues. The Indian Act, like the English Act, avoids making a firm a corporate body enjoying the right of perpetual succession"; *Bhagwanji v. Alembic Chemical Works Ltd.* (1948) A. PC. 100.

(r) James, L. J., *Ex parte Corbett* (1880) 14 Ch. Div. 122, 126.

this is so likewise in India (s) though the practical significance of the collective term receives a new emphasis in the present Act. It is true that under the Code of Civil Procedure, 1908, O. xxx, as under the English Rules of Court (now O. XLVIII), and, we are informed, by statute in many other jurisdictions, actions may be brought by and against partners in the name of the firm, and even between firms and their members; but this is only a matter of procedure (t). As a firm is not a legal entity there cannot be a partnership of firms, but when two firms combine the legal effect is that the individuals in the two firms become partners (u). The firm's property, again, is recognized in more than one way, but only as that which is "joint estate" of all the partners as distinguished from the "separate estate" of any of them, not as belonging to a body distinct in law from its members.

Firm-name.—Under our normal law (v) there are no prescribed forms for the style of a firm, and the liberty of partners to assume any firm-name they please is bounded only by the general rules as to goodwill (p. 329 below) and trade names (w). A firm-name may be personal or impersonal, singular or plural, and need not contain the name of any existing partner. The style of one well-known bookselling house in London consists simply of the name of the original founder, long since dead. "X. & Co.," "X., Y. & Z.," "The X. Co.," "X. & Son," "X.'s Sons" (common in America), "X. Brothers," and other varieties, are alike usual and allowed. Also there is no general rule to prevent a sole continuing member of the firm X. & Co. from continuing to trade as X. & Co. nor indeed to prevent X. or Z., who has never had a partner, from trading under the style of X. & Co., provided that he is not thereby doing wrong to an existing X. & Co. Most commercial countries not under the Common Law have precise regulations in these matters. The principle of the Common Law, on the other hand, is to allow great latitude in the use of personal names so long as they are not assumed or changed for purposes of deception. "Individuals may carry on business under any name and style they may choose to adopt" (x), provided they do not

(s) *Seodoyal Khemka v. Joharmull Mannull* (1923) 50 Cal. 549, 558, A. I. R. 1924 Cal. 74, 75 I. C. 81 (amendment of title of suit); *Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.* (1927) 55 Cal. 551, 105 I. C. 549, A. I. R. 1928 Cal. 148; *Kader Bux Omer Hyat v. Bukt Behari* (1932) 36 Cal. W. N. 489, A. I. R. 1932 Cal. 768; *In the matter of Jai Dayal Madan Gopal* (1932) 54 All. 846; *Mahammad Abdul v. Sheikh Ismail*, A. I. R. 1934 Mad. 9, 148 I. C. 1137.

(t) It does not authorize the use of the firm-name so as to make a partner in substance both plaintiff and defendant: *Meyer & Co. v. Faber* [1923]

2 Ch. 421 C. A.

(u) *Seodoyal v. Joharmal* (1923) 50 Cal. 549; *Muhammad Abdul v. Sheikh Ismail*, A. I. R. 1934 Mad. 9, 148 I. C. 1137; *Brij Kishore v. Sheo Charan* (1938) All. 100, 173 I. C. 853, A. I. R. 1938 All. 69.

(v) The Registration of Business Names Act, 1916, extends only to the United Kingdom and does not limit the choice of names.

(w) In rare cases the concealment of one's usual name may be fraudulent. This could hardly apply to a firm.

(x) *Erle, C. J., Maughan v. Sharpe* (1864) 17 C. B. N. S. at p. 492; *Levy v. Walker* (1879) 10 Ch. Div. 436, 445.

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adopt a name tending to mislead the public into confusing them with others already trading under the same or like names. It is not true, on the other hand, that a man has a positive and universal right to employ his usual name. As a rule the mere fact that a rival's name resembles his own is no reason for restraining him from dealing in the name he has always borne. The Court will not interfere merely because the similarity may be an occasion for careless people to make mistakes. Lord Justice Knight Bruce said in a celebrated judgment: "All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers" (y). A man has no monopoly in his name; the question of substance is always whether the defendant is trying to pass off his wares as the wares of another and this must be decided according to the evidence in each case. Where fraudulent intention is shown, on the other hand, it is not a sufficient answer for the defendant to say that the name he is using in business is the name he has adopted for all purposes; freedom of choice does not extend to choosing just that name which will enable one to appropriate the reputation of another man's goods (z). The same reasons apply to the use of corporate names (a) and firm-names (b) and also to the use of distinctive trade names for goods (not to be confused with registered trade marks); in this last case a name which, taken alone, is a literally true description of the goods sold under it may be rendered fraudulent by the manner and circumstance of its use (c). "A statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth" (d). Even a true name, personal or other, is not a commodity to be sold and trafficked in without regard to the use that may be made of it (e).

Illegal partnership.—"The illegality of a partnership affords no reason why it should not be sued (f). It cannot indeed be effectually sued by any person who, being aware of all facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not *per se* afford any answer to a

(y) *Burgess v. Burgess* (1853) 3 D. M. & G. 896, 903; see also the judgment of Turner, L. J., at p. 905 (98 R. R. 350, 354, 355).

(z) *Pinet & Cie. v. Maison Louis Pinet* [1898] 1 Ch. 179.

(a) *Saunders v. Sun Life Assurance Co. of Canada* (1894) 1 Ch. 537.

(b) *Turton v. Turton* (1889) 42 Ch. Div. 128, really a very plain case; see *per Lord Macnaghten* [1896] A. C. at

p. 220.

(c) *Montgomery v. Thompson* (1891) A. C. 217; *Reddaway v. Banham* [1896] A. C. 199.

(d) Lord Macnaghten [1896] A. C. at p. 219.

(e) *Fine Cotton Spinners' etc. Association v. Harwood, Cash & Co.* [1907] 2 Ch. 184.

(f) *Brahamayya v. Hamiah* (1920) 43 Mad. 141, 54 I. C. 45.

demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpis causa non oritur actio*; and he, not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership" (g).

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Indian Companies Act, 1913, sec. 4.—It will be remembered that the number of persons who may form an ordinary partnership is limited both in England (Companies Act, 1929, secs. 357, 358) and in India (Companies Act, 1913, sec. 4) to ten for banking or twenty for any other business. These provisions supersede the question, speculative and antiquarian even in England, whether it is an offence to assume to act as a corporation (h).

5. The relation of partnership arises from contract and not from status ;

Partnership not
created by status.

And, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

Partnership not created by status.—The explicit declaration of the law in this section is required, in the words of the Select Committee, by "the vast extent of non-contractual quasi-partnership relations in India." Such relations are founded on special rules of personal law concerning the management of family property, and lack the decisive characteristic feature of real partnership, the authority to act for the firm deemed to be conferred on every member of it by the partnership agreement.

The Privy Council has held that a joint Hindu family through the agency of its Karta can enter into contractual relations either with a stranger or even with an individual coparcener in respect of his separate property and also with a firm. A joint Hindu family has, in substance, been accorded a legal personality (i).

Joint Hindu Family business.—The case of joint ownership in a trading business created through the operation of Hindu law between

(g) Lindley, p. 140; *Appa Dada v. Ramkrishna Vassudeo* (1929) 53 Bom. 652, 121 I. C. 581, A. I. R. 1930 Bom. 5 [a case in which the alleged illegal partnership was carried on in Sangli State, to which

the Indian Companies Act was not applicable].

(h) See Pollock, Digest of Partnership, 12th ed. 27.

(i) *Lachhman Das v. Commissioner of Income-tax* (1948) A. PC. 8.

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the members of an undivided Hindu family must be distinguished from that of a true partnership arising out of contract (j). The rights and liabilities of the coparceners in the former case cannot be determined by exclusive reference to this Act, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of united families (k). According to those rules, the death of one of the coparceners does not dissolve the family partnership; nor, as a rule, can one of the coparceners, when severing his connection with the business, ask for an account of past profits and losses (l). Further, the managing member of the family can pledge the credit or property of the family for the ordinary purposes of that business (m); but the other coparceners are liable to the extent of their interest in the family property only, unless the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties or one which they have subsequently ratified (n). And though a trade, like other property, is descendible amongst Hindus, it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading firm, so as to require him to join as a plaintiff in suits on dealings and transactions with the adult members of the family carrying on the family business (o). In the case, however, of a partnership composed of certain individual members of a joint Hindu family and others who are strangers to the family, the relations of the parties are governed by the provisions of this Act, and not by any rules governing a joint Hindu family (p). The fact that the manager of a joint Hindu family has entered into a contract of partnership does not make other members of the family members of the partnership (q). Two Hindu joint families cannot unite to constitute a partnership but their managing

(j) No such joint family business is known to Mahomedan law : *Solema Bibi v. Hafez Mahammad Hossein* (1927) 54 Cal. 687, 104 I. C. 833, A. I. R. 1927 Cal. 836.

(k) *Chhedi Lal v. Commissioner of Income-tax* (1942) 17 Luck. 426, 197 I. C. 478, A. I. R. 1942 Oudh 108.

(l) *Sāmalbhāi v. Someshvar* (1880) 5 Bom. 38.

(m) *Bemola v. Mohun* (1880) 5 Cal. 792; *Ramlal Thakursidas v. Lakhmichand Muniram* (1861) 1 B. H. C. app. li. There is no such implied power to pledge family property for embarking on an entirely new business : *Morrison v. Verschoyle* (1901) 6 C. W. N. 429.

(n) *Chalamayya v. Varadayya* (1898) 22 Mad. 166; *Bishambhar Nath v. Sheo Narain* (1906) 29 All. 166; *Bishambhar Nath v. Fateh Lal* (1906) 29 All. 176; *Sāmalbhāi v. Someshvar* (1880) 5

Bom. 38.

(o) *Latchmanen v. Siva Prokasa* (1899) 26 Cal. 349; *Vadilal Lallubhai v. Shah Khushal Dalpatram* (1903) 27 Bom. 157; *Official Assignee of Madras v. Palaniappa Chetty* (1918) 41 Mad. 824, 49 I. C. 220.

(p) See *Anant Ram v. Channu Lal* (1903) 25 All. 378; *Pichappa Chettiar v. Chockalingam Chettiar* (1934) 67 M. L. J. 366, 36 Bom. L. R. 976, 150 I. C. 802, A. I. R. 1934 P. C. 192; *Kanhaya Lal v. Devi Dayal*, A. I. R. 1936 Lah. 514.

(q) *Gangayya v. Venkataramiah* (1918) 41 Mad. 454, 43 I. C. 9; *Kharidhar Kapra Co., Ltd. v. Daya Kishan* (1921) 43 All. 116, 58 I. C. 765; *Harnamdas v. Mayadas Lakhmichand* (1925) 87 I. C. 905, A. I. R. 1925 Sind 310; *Mirza Mal v. Rameshar* All. L. J. (1929) 641, 118 I. C. 145, A. I. R. 1929 All. 536.

members may become partners each having rights and duties with reference to their respective families (r).

The Special Committee was apparently pressed to include in this section details which are really domestic matters of Hindu family law, but refused. "We have considered," they noted, "whether some provision should be made for the rights and obligations of the members of a joint Hindu family in cases where the *karta* of a joint family enters into partnership with a stranger, acting for the joint family and employing its family assets. The decisions in India have uniformly held that in such a case the *karta* or the manager alone must be taken to be the partner and that the stranger is entitled and bound to treat only with the *karta*. . . . We think that, since the Hindu law permits a *karta* to enter into partnership in this way, the members of the family who are not parties to the contract should not be clothed with any rights against the stranger partners"; which, they add, would in their opinion lead to inextricable confusion.

Observe that the *karta's* authority does not, in any case, extend, as regards minor members of the family, beyond ancestral business; "the manager of a joint family has no power to impose upon a minor member of the family the risk and liability of a new business started by him." This is, of course, a perfectly general rule in no way confined to partnership matters (s).

6. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Mode of determining existence of partnership.

Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the

(r) *Udai Chand v. Than Singh* (1935) 62 Cal. 586, 157 I. C. 937, A. I. R. 1935 Cal. 537.

(s) *Benares Bank, Ltd. v. Hari*

Narain (1932) L. R. 59 I. A. 300, following *Sanyasi Charan Mandal v. Krishnadhan Banerji* (1922) L. R. 49 I. A. 108.

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persons carrying on the business; and in particular, the receipt of such share or payment—

- (a) by a lender of money to persons engaged or about to engage in any business,
- (b) by a servant or agent as remuneration,
- (c) by the widow or child of a deceased partner, as annuity, or
- (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof,

does not of itself make the receiver a partner with the persons carrying on the business.

Mode of determining existence of partnership.—The note of the Special Committee says that Clause 5, as this section was numbered in the draft, is a comprehensive statement of the rule in *Cox v. Hickman* (t) and adds that it has not been incorporated in the English Partnership Act. What *Cox v. Hickman* did was to deny the erroneous but then common opinion that sharing the profits of a business was not only evidence but conclusive evidence of partnership. Thus the Courts were left free to arrive at the real intention of the parties by considering all relevant documents and facts, as they are bound to do in all cases where there is no special rule of evidence or law compelling them to exclude matters which in themselves are relevant. Accordingly sec. 2 of the English Partnership Act denies, by way of example and to ensure greater certainty, repeating the substance of a rather curious piece of legislation (u)—sundry examples of the erroneous opinion, but does not tell the Courts in terms that the universal principles of decision in cases of disputed agreements are to be applied to partnership cases. Nothing at all closely resembling the language of the principal paragraph appears to occur in the several opinions delivered to and in the House of Lords in *Cox v. Hickman* (above). But in the opinion of the Judicial Committee in *Mollwo, March & Co. v. The Court of Wards* (v), we read: “It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership and that (w) there may be cases where, from such perception

(t) (1860) 8 H. L. C. 268.

(u) Curious because, five years after the decision in *Cox v. Hickman*, the extent of its effect was not fully understood even by learned persons: see Pollock, Digest, 12th ed., p. 20. We shall come to the details presently.

(v) (1872) L. R. 4 P. C. 419, 435; *Chimanram v. Jayantilal* (1939) Bom. 616, 41 Bom. L. R. 899, 184 I. C. 397, A. I. R. 1939 Bom. 410; *Hari Sao v. Gulab Chand* A. I. R. 1940 Pat. 116.

(w) *Sic*. This word is ungrammatical in the sentence, and seems to have crept in by mistake.

alone, it may, as a presumption, not of law but of fact, be inferred ; yet that whether that relation does or does not exist must depend on the real intention and conduct of the parties."

The principle and some of the cautions most commonly needed in its application are set forth by the present section in a form much neater than that of secs. 240-243 of the Contract Act, and yet with greater completeness in substance. When the Contract Act was framed, the British Act called Bovill's of 1866 (superseded since 1890 by sec. 2, sub-sec. 3, of the Partnership Act) was recent, and the authors of the Contract Act naturally took it as a model though it was not a good one. Bovill's Act was a somewhat illogical result of the desire experienced by a considerable number of business men (for the most part in fear of the doctrine, declared erroneous in *Cox v. Hickman*, p. 316 above, that sharing profits is conclusive evidence of partnership) for the introduction of the system of *commandite* partnership, long familiar on the Continent of Europe, and largely adopted in the United States. That form of partnership is a true limited partnership in which one or more active members are liable without limit as ordinary partners but the others are liable only to the extent of the capital they respectively contribute or undertake to contribute. For some obscure reason—possibly the influence of narrow-minded small tradesmen or their representatives in Parliament—lawyers and legislators in England disliked the principle and would not try to understand it, and Parliament enacted a clumsy and fragmentary statement of particular immunities which in truth, though nobody knew it at the time, were involved in the reasons of the House of Lords in *Cox v. Hickman*. At last a Limited Partnerships Act was passed in 1907 (x) but it has not been much used, since in practice the like results can be obtained, it is generally thought with more convenience, by forming a private company. At this day the Indian Legislature is free from the entanglement due to the unlucky episode of Bovill's Act, and has much improved the statement of the law. The former episodes now briefly mentioned are henceforth no more than ancient history for Indian lawyers.

English authorities on various ways of sharing profits which do not make the sharer a partner have already been cited in our commentary on sec. 4 : see under the headings of Sharing Profits and Partnership and Service, pp. 306-309 above.

Long ago it was rightly held in India that misconceived use of the word "partner" in an agreement which really constitutes a relation of debtor and creditor does not alter its effect (y). On the other hand, an

(x) See the Appendix to Pollock's Digest of the Law of Partnership.

(y) *Bhagga Lal v. De Gruyther* (1881) 4 All. 74. See also *Raghermandan v. Hormanjee* (1927) 51 Bom. 342, 346-347 ;

Mamooji v. Tayebali, A. I. R. 1933 Sind 210, 146 I. C. 730 ; *Karnidan Sarda v. Sailaja Kanta* (1940) 19 Pat. 715, 192 I. C. 187, A. I. R. 1940 Pat. 683.

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agreement for a so-called loan which in effect gives the lender the position and powers of a partner may make him liable as a partner to creditors of the business (2).

7. Where no provision is made by contract between the partners for the duration (a) of their partnership, or for the determination of their partnership, the partnership is "partnership at will."

Partnership
at will.

Partnership at will.—The right of any partner, where the partnership is at will, to dissolve the firm by notice in writing to the other members or member, is declared by sec. 43 below, where the requirement of writing appears to be new. Otherwise the two sections taken together correspond in effect to sec. 253, sub-sec. 8, of the Contract Act. Cp. the English Partnership Act, sec. 32 (c). Before the present Act, when notice of any kind was sufficient to determine a partnership at will, an intention to dissolve the firm might be inferred from circumstances showing that a partner had in fact abandoned his interest. Now that the intention has to be expressed in writing, the authorities on that point obviously become inapplicable, and it is thought useless to refer to them, especially as it was a matter of evidence on which no definite rule could be laid down. We find nothing in the notes of the Special Committee to throw light on the innovation, doubtless a salutary one.

8. A person may become a partner with another person in particular adventures or undertakings.

Particular
Partnership.

"Particular" Partners.—The Special Committee noted on the draft of this section that it "is new matter and is inserted to meet cases which are probably much more frequent in India than in England. The practice of establishing 'particular partnership' is much favoured by Indian firms with numerous branches, and the practice should not be hampered by doubts regarding the extent of the liabilities of the 'particular partner.'" The wording is rather curious; one would have expected "person or persons" and "a particular adventure or undertaking." Is it beyond possibility that some captious pleader may argue that not more than two persons can be partners together under this section? To an English legal mind the only difficulty is to see why there should be any objection or trouble about confining the scope of a

(2) *Polley v. Driver* (1876) 5 Ch. D. 468; *Ex parte Delhasse* (1877-8) 7 Ch. Div. 511. In both cases the agreement purported to be under Bovill's Act.

(a) The difficulties which arise in

English law on the question whether a partnership is a partnership at will or not can hardly arise under Indian law: *Moos v. Elphicke* [1910] 1 K. B. 846; *Abbott v. Abbott* [1936] 3 All. E. R. 823.

partnership undertaking within whatever limits the parties choose to determine. In Scotland, it is true, a joint adventure is recognized as a distinct variety of partnership "confined to a particular adventure, speculation, course of trade, or voyage," with the addition that "the partners, either latent or known, use no firm or social name" (b). The substantive incidents do not appear to differ from those of ordinary partnership (note however that in Scotland, where the firm is formally recognized as a person, the absence of a firm-name may be regarded as a substantial difference). In England, there is no technical distinction at all, and no one has ever suggested, to the present writers' knowledge, that it would be of any use (c).

(b) *Bell's Principles*, art. 392.

(c) It need hardly be stated that all the requisites of a partnership must be present before a partnership between two

persons limited to a single adventure is held to be a partnership: *Suganmal v. Mt. Umraobi*, A. I. R. 1938 Nag. 550.

CHAPTER III.

RELATIONS OF PARTNERS TO ONE ANOTHER.

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✓ **9.** Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

General duties of
partners

General duties of partners.—This section is identical with sec. 257 of the Contract Act, save that “the firm” is substituted for “the partnership” in accordance with the stricter use of terms in the present Act. Its opening general words come from a time-honoured clause which used to be a common form in English partnership articles. In the corresponding sec. 28 of the English Act they do not appear. Presumably the reason for dropping them was that, considered as a legislative command, they have no definite operative effect. It would have done no harm to keep them, and it is certainly better to do so in India; they place in conspicuous view the general tradition of good faith and honour on which the whole law of partnership and the whole duty of partners are founded.

In a transaction between partners for the sale and purchase of a share in the business, if one of them is better acquainted with the accounts than the other, it is his duty to disclose all material facts; but the party entitled to such disclosure may elect at any stage to waive his right to further information, even if he knows that there has been some concealment of facts which he has since discovered, and believes that other facts are still concealed (*d*). In other words, his election to affirm the contract, or to compromise his claim if he does so elect, is as binding as in the case of any other voidable contract.

✓ **10.** Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

Duty to indemnify
for loss caused by
fraud.

Fraud of partner.—This section is novel in form. It was added by the Special Committee, see their note on cl. 14 of the Bill. The point of it is as follows: A partner can, by contract between the partners, be exempted from liability to the firm for loss caused by his neglect, even if wilful, in the conduct of the business. Generally he is liable for such loss but this is expressly subject to contract between the partners | see sec.

(*d*) *Law v. Law* [1905] 1 Ch. 140, | to be final was the compromise of an
C. A. The settlement held by the Court | action for damages for misrepresentation.

13 (f) below. But he cannot contract himself out of liability for fraud. It has been judged expedient to declare this in a conspicuous and emphatic form, though, it is submitted, the law was already clear enough. Fraud in all shapes and under all disguises, with or without any special relation of confidence between the parties, is unconditionally condemned, not only by our law, but by all civilized systems of justice. If there is any case in which a man is allowed to contract himself out of liability for deceit, we do not know where it is to be found. True it is that, for the purpose of preserving and extending their beneficent jurisdiction and remedies, English courts of equity did at one time say that various failures in duty, especially in duties of a fiduciary kind, were "fraud in the eyes of this Court" or "constructive fraud." Such cases, with which we now deal in a more straightforward manner, are no real exception; they did not as a rule involve dishonesty, and indeed the Court of Chancery, in its zeal for beneficial owners, at one time required of trustees a more astute vigilance and a more consummate prudence than are within the compass of an ordinary reasonable man's ability, so that, almost in our own time, Parliament had to come to the rescue. This caution may be necessary for readers not accustomed to the language current in English (and also American) books of equity jurisprudence down to the middle of the nineteenth century.

See
10, 11

Long ago, in Sir F. Pollock's Tagore lectures on "The Law of Fraud, Misrepresentation and Mistake in British India," at pp. 39-42, some remarks were made on this matter of "constructive fraud," to which it may now be added that the old Court of Chancery could not make use of the simpler and broader conception of implied contract because it might not openly trespass on the jurisdiction of the courts of common law. Its artificial devices, long obsolete in England, have nothing to do with Indian practice.

11. (1) Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Determination of rights and duties of partners by contract between the partners.

Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing.

(2) Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872, such agreements in restraint of trade, contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Agreements in restraint of trade.

S. 11**Sub-sec. 1: Determination of rights and duties of partners.—**

The first sub-section states in a more direct and positive form the elementary principle already implied in secs. 252 and 253 of the Contract Act. Partnership is a relation eminently depending on the consent of the parties, not only for its existence, but for the terms of the agreement in all things consistent with its essential nature and purpose (e); and an agreement to become partners in the first instance, or to vary the terms at any time, need not be manifested in any particular form.

It is really needless to cite authorities, but reference may be made to *Const v. Harris* (f), where, among divers and multifarious dicta, Lord Eldon laid down that a majority of partners can regulate matters of detail but the substantial terms of their agreement can be amended only by the consent of all. A judicial statement made twenty years later shows that the law was by that time well settled, and expresses it in a clear and positive manner, too often wanting in Lord Eldon's judgments.

"With respect to a partnership agreement, it is to be observed, that all parties being competent to act as they please, they may put an end to or vary it at any moment; a partnership agreement is therefore open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and to their mode of conducting their business; when, therefore, there is a variation and alteration of the terms of a partnership, it does not follow that there was not a binding agreement at first. Partners, if they please, may, in the course of the partnership, daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business, provided those additions or alterations be made with the unanimous concurrence of all the partners" (g).

A practice of the firm, though not part of the original agreement, may become binding by usage, and alterable only by consent. Examples: mode of valuing assets (h), adjustment of profit and loss account (i).

Sub-sec. 2: Agreements in restraint of trade.—Sub-sec. 2 re-enacts, with some verbal amendment, the substance of exception 3 to sec. 27 of the Contract Act, which is one of the enactments repealed by the present Act (sec. 73 and Sched. II). As to the treatment of agreements in restraint of trade by the Contract Act, see the commentary on sec. 27 in ed. Pollock and Mulla.

(e) It may be agreed that if any partner desires to retire he should sell his share to the other partners, the valuation to be referred, if necessary, to arbitration. In such a case a suit for dissolution does not lie: *Dropadi v. Bankeylal* (1939) All. 577, 184 I. C. 511, A. I. R. 1939 All. 548.

(f) (1823-4) T. & R. 496. Students

are not advised to read the case at large.

(g) Lord Langdale M. R. in *England v. Curling* (1844) 8 Beav. 129, 133; 68 R. R. 39, 42.

(h) *Coventry v. Barclay* (1864) 3 De G. J. & S. 320.

(i) *Ex parte Barber* (1870) L. R. 5 Ch. 687.

Agreements of the kind protected by this sub-section are in fact extremely common, and it would be an intolerable hindrance to business if they were not allowed.

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12. Subject to contract between the partners—

The conduct of the business.

- (a) Every partner has a right to take part in the conduct of the business ;
- (b) Every partner is bound to attend diligently to his duties in the conduct of the business ;
- (c) Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided, but no change may be made in the nature of the business without the consent of all the partners ; and
- (d) Every partner has a right to have access to and to inspect and copy any of the books of the firm.

This and the next section correspond generally to sec. 24 of the English Act and embody the most part of sec. 253 of the Contract Act.

Paras. (a) and (b).—Paragraphs (a) and (b) taken together show the presumable right and duty of every partner to take part in and attend to the business of the firm. But variation by contract is rather the rule than the exception in practice. It is quite common to provide by express agreement that this or that partner need not, sometimes that he may not, take any active part in the business, and also to assign a salary to be paid to a managing or active partner.

Any such salary will, of course, rank in taking accounts as between the partners as a debt from the firm.

Para. (c).—Paragraph (c) re-enacts the substance of the Contract Act, sec. 253 (5) with verbal amendment and specification of every partner's right to be heard before the matter is decided—a right about which there was never any doubt. Also, as in all other cases of the exercise of power by a majority acting in a quasi-judicial capacity, the decision must be made in good faith with a view to the common advantage of the whole body, and when so made is conclusive (j).

Para. (d).—Paragraph (d) corresponds to the latter part of sec. 24, sub-sec. 9, of the English Act. A partner may exercise his right of inspecting the books by an agent, provided that he is a fit person and

(j) See, if required, *Const v. Harris*, note (f), p. 322 above.

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undertakes, if required, not to use the knowledge thus obtained for any other purpose than the confidential information of his principals (k). The partner himself, no less than his agent, might be restrained if necessary from using copies or extracts made in the exercise of his right for purposes hostile or injurious to the interest of the firm (l).

The Bill as drafted by the Special Committee followed the English Act in prescribing that the firm's books shall be kept at its place of business, or the principal place if there are more than one. But the Select Committee struck this out for two reasons. First, that the principal place may well be in an Indian State outside British jurisdiction, where the Act cannot be directly enforced. (It seems rather strong to say that the provision would be of no value; surely there is such a thing in Indian States as executing a foreign judgment; but certainly there would be some inconvenience and delay). The second reason is that the principal place of business can be defined only by the partners themselves. With all respect, this is not convincing. The partners of a firm having more than one place of business will and generally do, if they are wise men, declare in terms where the books are to be kept, but if they do not, it is for the Court to ascertain, if necessary, from the usage of the firm and those who deal with it, which is in fact the principal place.

The result is that the present Act, like the Contract Act, says nothing about the custody of the books. However, the Contract Act was in force for sixty years without its silence on this point causing, so far as appears, any considerable inconvenience.

13. Subject to contract between the partners—

- Mutual rights and liabilities. (a) A partner is not entitled to receive remuneration for taking part in the conduct of the business;
- (b) The partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;
- (c) Where a partner is entitled to interest on the capital subscribed by him such interest shall be payable only out of profits;
- (d) A partner making, for the purposes of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent. per annum;

(k) *Bevan v. Webb* [1901] 2 Ch. 59, 81, C. A. | (l) *Trego v. Hunt* [1896] A. C. 7, 26.

- (e) The firm shall indemnify a partner in respect of payments made and liabilities incurred by him—
- (i) in the ordinary and proper conduct of the business, and
 - (ii) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances; and
- (f) a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm.

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Paras. (a) and (b).—The substance of this section differs only in drafting, and especially in arrangement, from the law declared or plainly implied by the Contract Act. The first two paragraphs declare the presumptions of work done for the firm being gratuitous, and profits being divisible and losses apportionable in equal shares; it is notorious that those presumptions are constantly superseded by express agreement, and they might be so by the continued usage of the firm without any agreement in terms. It may be agreed that as between the partners any one or more of them shall not be liable for losses (*m*), or that the profit or loss of two partners is joint (*n*). Where shares are unequal, upon the retirement of a partner his share becomes merged in the firm and is distributable in the proportion of the shares of the remaining partners (*n1*).

Para. (c).—The principle of paragraph (c) is that a partner, as regards the capital brought by him into the business, is not a creditor of the firm but an adventurer, and therefore any agreed interest on such capital is, unless the contrary is clearly expressed, a payment in lieu or on account of profits, and accordingly chargeable to profits only.

Para. (d).—Paragraph (d) calls for no comment; it is identical with sec. 24, sub-sec. 3, of the English Act, but for minute verbal difference, except that six per cent. is named as being the Indian standard rate of interest (*o*). A partner, however, is not entitled to interest after the

(*m*) *Raghunandan v. Hormasjee* (1927) 51 Bom. 342, 29 Bom. L. R. 207, 100 I. C. 1025, A. I. R. 1927 Bom. 187; *British Cotton Growers' Association (Punjab) Ltd. v. Commissioner of Income-tax* (1937) Lah. 306, 168 I. C. 549, A. I. R. 1937 Lah. 338.

(*n*) *Hukumchand Sarupchand v. Hansraj Harji* (1938) 2 M. L. J. 966

(P.C.).

(*n1*) *Mohammad Abdul v. Hafiza Bibi* (1944) Mad. 729, (1944) A. M. 348, 220 I. C. 422.

(*o*) See *Somasundaram v. Sevugaru Chettiar* (1940) 190 I. C. 748, A. I. R. 1940 Mad. 505; *Motilal v. Sarupchand* (1936) 38 Bom. L. R. 1058, 167 I. C. 208, A. I. R. 1937 Bom. 81.

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date of dissolution unless there is an express or implied agreement to the contrary (p).

Para. (e).—Paragraph (e) consists of two branches which are founded on distinct principles and must on no account be confused. By clause (i) the general rule of an agent's right to indemnity in respect of lawful acts done by him in the exercise of his authority (Contract Act, sec. 222, which see) is applied to the case of a partner acting in the firm's business. The closely similar words of the English Act, sec. 24, sub-sec. 2 (a), are "in the ordinary and proper conduct of the business of the firm." What is covered by that description is obviously a question of fact depending on the nature and circumstances of the business and express rules, if any, made by agreement between the partners,

Sub-clause (ii) corresponds to sec. 24, sub-sec. 2 (b), of the English Act, which declares a partner's right to indemnity for expenses "in or about anything necessarily done for the preservation of the business or property of the firm." Here the wording is fuller and gives more precise guidance to the Court, as is certainly desirable in India.

The outgoings for which a partner may be entitled to reimbursement under this clause are in the nature of emergency or salvage expenses, being incurred by him personally on behalf of the firm in circumstances of extraordinary requirement. Money payments to satisfy debts of the firm are the commonest examples under this head. There may also be urgent and necessary payments required for keeping the business of the firm in existence as a going concern; thus in a mining business it may be necessary to sink a new shaft promptly to get at unexhausted minerals. Claims of this kind are somewhat anomalous, and justified only by necessity, and the Court is not disposed to extend their scope (q). But when extraordinary expenditure of this kind is once found to be authorized by necessity, the necessity found to exist is the only measure of the amount which can be allowed as proper; there is no rule whereby it is limited to the nominal capital of the concern (r). No recent decisions have been found on the topic, and in fact the English reported cases mostly, if not wholly, arose in the early period of joint-stock enterprise and under conditions which modern company law has superseded. Only one case in a private partnership illustrating the principle is known to the writer, and there the point is not very clear or conspicuous (s).

Para. (f).—Paragraph (f) is new in form. A partner's general duty to attend diligently to the firm's business is of course broken by wilful

(p) *Motilal v. Sarupchand* (1936) 38 Bom. L. R. 1058, 167 I. C. 208, A. I. R. 1937 Bom. 81.

(q) *Ex parte Williamson* (1869) L. R. 5 Ch. 309, 313; *The German Mining Co.'s*

Case (1853) 4 D. M. & G. 19, 102 R. R. 7.

(r) 4 D. M. & G. at p. 42, 102 R. R. 19.

(s) *Burdon v. Barkus* (1862) 4 D. F. & J. 42, 135 R. R. 19.

neglect in conducting it, and there is authority, if it were needed, to show that in taking accounts under the direction of the Court, one partner may have compensation awarded him for damage incurred through the neglect of another (t). Moreover a general statement of the principle was made long ago by an eminent English judge, and may be taken as authoritative even if it was not strictly necessary for his decision, "Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interest, in breach of his duty to the partnership; whether in law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect" (u). Questions of this kind occur, as a rule, only on the dissolution of a firm. There was already authority, not much of it but enough, to show that a partner on whom the whole management of the business is thrown by another's wilful neglect of it is entitled to compensation (v).

As to the term "wilful neglect" the framers of the Act used it "as meaning that degree of neglect shown by abstention from an obvious duty, attended by a knowledge of the likely results of the abstention." (Special Committee's note.) A classical example of this kind of negligence, though the particular case has nothing to do with partnership, occurred nearly a century ago in *Vaughan v. Menlove* (w) where the defendant, being warned that a hayrick on the border of his land was in danger of fermenting and taking fire, said he would chance it. The point decided was that what the law requires of every man is the diligence of a reasonable man in the circumstances, not merely that which appears reasonable to himself.

The Special Committee's note on this section suggests the question, apparently never yet raised in practice, whether sec. 212 of the Contract Act, defining the skill and diligence required of agents, is applicable to partners acting on behalf of the firm. By that section an agent is liable for not having the ordinary skill of persons doing the kind of business in hand "unless the principal has notice of his want of skill." That exception would make the application of the rule as between partners precarious, for mutual confidence is of the essence of their contract, and is presumed to be founded on knowledge of one another's aptitude for the business. It is hard, therefore, to see how one active partner could well deny notice of another's want of skill. In any case the provisions of the present Act are more appropriate and adequate.

(t) *Airey v. Borham* (1861) 29 Beav. 620, 131 R. R. 736—see the terms of the inquiry ordered by the Court.

(u) Knight Bruce V.-C. in *Bury v. Allen* (1845) 1 Coll. C. C. 589, 604, 66 R. R. 200, 210. Cp. Lindley 742, whence it appears that some one supposed the

Partnership Act (we cannot guess why) to have altered the law.

(v) See *Airey v. Borham* (1861) 29 Beav. 620, 131 R. R. 736; *Krishnamachariar v. Sankarah Sah* (1920) 22 Bom. L. R. 1343, 57 I. C. 713, P. C.

(w) (1837) 3 Bing. N.C. 468, 43 R. R. 711.

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Paragraph (f) read in the original draft "loss caused to it by his fraud or wilful neglect." By reason of the general heading of the section, "Subject to contract between the partners," this would have made it possible for an express agreement between the partners to exempt a partner from liability to compensate the firm for losses caused, not only by his negligence in the conduct of the business, but by his actual fraud. The result would have been that even if the fraud amounted to a criminal offence and the offending partner might be prosecuted for it, the firm would be without redress. No wonder that the Select Committee struck out the words "fraud or" with the very temperate observation: "We consider that it will be improper to allow any partner to contract himself out of liability for fraud, and it is very doubtful if such a contract will be legal." As to legality, there are no assignable bounds in point of law to the immunities a sovereign legislature may confer if it thinks fit. But it is not at all doubtful that a dispensation to commit frauds is a flagrant contradiction of natural justice and public policy. One is almost tempted to suspect some oversight in the report of the Drafting Committee. However that may be, the Select Committee's deletion was not only proper but necessary.

14. Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

The property of
the firm.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

Property of the firm.—The first paragraph of this section corresponds in fact to sec. 253, sub-sec. 1, of the Contract Act, with the very important express addition of goodwill to the contents of the firm's property, and omission of the words defining a partner's share. The second paragraph is substantially identical with sec. 21 of the English Act. It is not thought useful to call attention in detail to the rearrangement of the matter or to minor variations in wording. After all, the present Act stands on its own footing and speaks by its own authority.

As to the firm's property generally.—Property belonging to the partners, or to one of them, does not become property of the firm merely by being used for the purpose of the business (x). It will become

(x) *Lindley*, 415, 416; *Davis v. Davis* | *Mt. Gulab Devi* (1936) 162 I. C. 143,
[1894] 1 Ch. 393; *Lachhman Das v.* | A. I. R. 1936 All. 270.

so only if the partners show an intention to make it so, as where the owner of a mill agrees to carry on the manufacture in partnership with others, and is credited in the accounts of the firm with the value of the mill and plant as his capital. In that case both the mill and any subsequent additions to the site and plant are the firm's property, and any increased value obtained for them on a sale of the business is divisible as partnership profits (y). Similarly where in subsequent dealings between the partners one partner's share in the land and business is treated as an undivided whole (z). The nature of the business may also be material (z).

Goodwill.—A firm's property generally includes goodwill, so far as it exists and has exchangeable value (a). Nothing is said in this place about the incidents of goodwill. But the rights of a buyer of goodwill on the dissolution of a firm are declared by sec. 55 below. "Goodwill" is properly a commercial term, signifying the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than the mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits; it may be summed up as "the whole advantage, whatever it may be, of the reputation and connection of the firm" (b). But a series of decisions has now given it a pretty definite legal character. A sale of goodwill conveys to the buyer (in the absence of any special provisions) the exclusive right of representing himself as the successor to the business, and also that of using the old name, provided that the seller is not thereby exposed to liability as an ostensible partner (c). Whether there is any substantial risk of which he can complain is a question of fact (d). It includes the benefit of any covenant by a partner not to carry on for a fixed time any business competing with that of the firm (e). It does not bind the seller not to compete with his successor (f), but he must not specially solicit the customers

(y) *Robinson v. Ashton* (1875) L. R. 20 Eq. 25.

(z) *Waterer v. Waterer* (1873) L. R. 15 Eq. 402. Where members of a joint Hindu family partition their business and lands and vary their share in the business but stipulate that their shares in the property should remain the same, a strong presumption is raised in favour of the view that the immoveable properties do not form part of the assets of the partnership: *Lachman Das v. Gulab Debi* (1936) 162 I. C. 143, A. I. R. 1936 All. 270.

(a) *Levy v. Walker* (1879) 10 Ch. Div. 436, 446. On dissolution by one partner's death "the goodwill of the business would be an asset, and might well be the most valuable asset, of the partnership":

In re David and Mathews [1899] 1 Ch. 378, 382, per Romer, J.; *Jennings v. Jennings* [1898] 1 Ch. 378; *Ramakrishna Ayyar v. Muthusami Ayyar* (1929) 52 Mad. 672, 121 I. C. 609, A. I. R. 1929 Mad. 456; *Mohammad Abdul v. Hafija Bibi* (1944) Mad. 729, (1944) A. M. 346, 220 I. C. 422.

(b) Lord Macnaghten, *Trego v. Hunt* [1896] A. C., at p. 24.

(c) *Thynne v. Shove* (1890) 45 Ch. D. 577; *In re David and Mathews* [1899] 1 Ch. 378.

(d) *Burchell v. Wilde* [1900] 1 Ch. 551 C. A.

(e) *Townsend v. Jarman* [1900] 2 Ch. 698.

(f) *Cook v. Collingridge* (1925) 27 Beav. 459, 23 R. R. 767.

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of the old firm (g), even those who may of their own accord have continued to deal with him (h).

The importance of goodwill as compared with other assets of a firm necessarily varies according to the nature of the business. In some kinds of business it may be inappreciable (i).

As regards the second paragraph of the section, the following illustrations may be found instructive.

Illustrations.

1. Land bought in the name of one partner, and paid for by the firm out of the profits of the partnership business, is partnership property unless a contrary intention appears (j).

2. One partner in a firm buys railway shares in his own name and without the authority of the other partners, but with the money and on account of the firm. These shares are partnership property (k).

3. The goodwill of the business carried on by a firm, so far as it has a saleable value, is partnership property, unless the contrary can be shown (l).

4. A and B take a lease of a colliery for the purpose of working it in partnership and do so work it. The lease is partnership property (m).

5. A and B, being tenants in common of a colliery, begin to work it as partners. This does not make the colliery partnership property (m).

6. If, in the case last stated, A and B purchase another colliery, and work it in partnership on the same terms as the first, the purchased colliery is not partnership property, but A and B are co-owners of it for the same shares and interest as they had in the old colliery (n).

7. W, a nurseryman, devotes the land on which his business is carried on and bequeaths the goodwill of the business to his three sons as tenants in common in equal shares. After his death the sons continue to carry on the business on the land in partnership, and two of them buy the share of the third in the land and business as an undivided whole. The land so devised to them is partnership property (o).

(g) *Trego v. Hunt* [1896] A. C. 7.

(h) *Curl Brothers v. Webster* [1904] 1 Ch. 685.

(i) See *Stewart v. Gladstone* (1879) 10 Ch. D. 626, 657.

(j) *Nerol v. Burnand* (1827) 4 Russ. 247, 2 Bli. N. S. 215, 38 E. R. 798, 28 R. R. 65; *Wedderburn v. Wedderburn* (1856) 22 Beav., at p. 104, 52 E. R., at p. 1047, 111 R. R. 70.

(k) *Ex parte Hinds* (1849) 3 De G. & Sm. 603, 64 E. R. 629.

(l) *Lindley*, 415. See more as to goodwill, p. 331 below.

(m) *Ibid.* 341; *Crawshaw v. Maule* (1818) 1 Swanst. 495, 518, 523, 36 E. R. 479, 18 R. R. 126, 132, 136. A fortiori, where the colliery belongs to A alone before the partnership; *Burdon v. Barkus* (1862) 4 D. F. & J. 42, 45 E. R. 1098, 135 R. R. 19.

(n) Implied in *Steward v. Blakeway* (1869) L. R. 4 Ch. 603; though in that case it was treated as doubtful if there was a partnership at all.

(o) *Waterer v. Waterer* (1873) L. R. 15 Eq. 402; *Cp. Davis v. Davis* [1894] 1 Ch. 393, 63 L. J. (Ch.) 219.

8. *A* is the owner of a cotton-mill. *A*, *B* and *C* enter into partnership as cotton-spinners, and it is agreed that the business shall be carried on at his mill. A valuation of the mill, fixed-plant, and machinery is made, and the ascertained value is entered in the partnership books as *A*'s capital, and he is credited with interest upon it as such in the accounts. During the partnership the mill is enlarged and improved, and other lands acquired and buildings erected for the same purposes, at the expense of the firm. The mill, plant, and machinery, as well as the lands afterwards purchased and the buildings thereon, are partnership property; and if on a sale of business, the purchase money of the mill, plant, and machinery exceeds the value fixed at the commencement of the partnership, the excess is divisible as profits of the partnership business (*p*).

9. *A* and *B*, partners, effect assurance on their lives for and on account of the partnership and the premiums in respect of the assurance policies are paid out of the funds of the partnership. The policies form part of the partnership assets (*q*).

The incidents of goodwill may be material in any case of a going business being transferred by sale or devolution of the trader's interest, and the rules that govern the results of such a transfer are, strictly speaking, no more included in partnership law than any other rules of property law which may be applicable to the affairs of a firm. Nevertheless these rules have been settled for the most part by decisions in suits arising out of the dissolution of firms, and the disposition of goodwill is one of the matters to be considered and provided for in the constitution of a firm. It is, therefore, thought that the following general statement of the English law may be found useful for reference.

Rights of partners as to goodwill.—On the dissolution of a partnership every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners (*r*). When the goodwill has been fully appropriated by the surviving partner with all the advantages flowing from the old business connections together with a trade mark, it is impracticable to direct a sale of the goodwill which has ceased to exist after many years. The only way to do justice between the parties is to value the trade mark and give a proportionate share of such value to the heirs of the deceased partner (*s*).

(*p*) *Robinson v. Ashton* (1875) L. R. 20 Eq. 25, 44 L. J. (Ch.) 542.

(*q*) *In re Adarji Mancherji Dalal* (1931) 55 Bom. 795, 133 I. C. 254, A. I. R. 1929 Bom. 87.

(*r*) *Lindley*, 539-541. In other words, the goodwill, and therefore

also the firm-name, is part of the partnership assets: *Levy v. Walker* (1879) 10 Ch. Div. 436, 446, 48 L. J. (Ch.) 273.

(*s*) *Mohammad Abdul v. Hafiza Bibi* (1944) Mad. 729, (1944) A. M. 346, 220 I. C. 422.

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Rights and duties of vendor and purchaser of goodwill.—

Where the goodwill of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following rules in the absence of any special agreement excluding or varying their effect :—

- (a) The purchaser alone may represent himself as continuing or succeeding to the business of the vendor (*t*).
- (b) The vendor may nevertheless carry on a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the same business (*t*).
- (c) The vendor may publicly advertise his business, but may not canvass the customers of the former firms (*u*), even if they have of their own choice continued to deal with him (*v*). This rule extends to a vendor's executor carrying out a contract for the sale of goodwill (*w*). It does not matter that the executor has no discretion as to selling.
- (d) The sale carries the exclusive right to use the name of the former firm (*x*), subject to this qualification, that the purchaser may use the vendor's name only "so long and so far as he does not by so doing expose him to any liability" (*y*). It also carries the benefit of any covenant by a partner not to carry on a competing business for a fixed term (*z*). The purchaser has the right to trade as the vendor's successor, but not to hold out the vendor as still in the business and personally answerable (*a*). A purchaser of "assets" without any restrictive terms, or a partner retaining the "assets" on dissolution, is entitled to the goodwill, with its incidental rights (*b*). The effect of special terms, if any, must be considered in each case as they occur (*c*).

(*t*) *Churton v. Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56. But the vendor's wife, having separate estate, cannot be restrained from carrying on a competing business on her own account and in her own name: *Smith v. Hancock* [1894] 2 Ch. 377, 63 L. J. (Ch.) 477, C. A. (diss. Kay, L. J.).

(*u*) *Trego v. Hunt* [1896] A. C. 7, 65 L. J. (Ch.) 1, where the House of Lords restored the authority of *Labouchere v. Dawson* (1872) L. R. 13 Eq. 322, against the Court of Appeal. A partner who has been expelled under a provision in the articles is not restrained from carrying on the same business on his own account or soliciting customers of the old firm: *Dawson v. Beeson* (1882) 22 Ch. Div. 504. Similarly, a bankrupt (*Walker v. Mottram* [1881] 19 Ch. D. 355, 51 L. J. (Ch.) 108) and a debtor who has assigned his business and goodwill for the benefit of creditors (*Farey v. Cooper* [1927] 2

K. B. 384, 96 L. J. (K. B.) 1046, C. A.) are not vendors for the purpose of the rule.

(*v*) *Curl Bros. v. Webster* [1904] 1 Ch. 685, 73 L. J. (Ch.) 540.

(*w*) *Boorne v. Wicker* [1927] 1 Ch. 667, 96 L. J. (Ch.) 361.

(*x*) *Levy v. Walker* (1879) 10 Ch. Div. 436, 48 L. J. (Ch.) 273; *In re David and Mathews* [1899] 1 Ch. 378, 68 L. J. (Ch.) 185.

(*y*) *Thynne v. Shove* (1890) 45 Ch. Div. 577, 582, 59 L. J. (Ch.) 509.

(*z*) *Townsend v. Jarman* [1900] 2 Ch. 698, 69 L. J. (Ch.) 823.

(*a*) 45 Ch. Div. at p. 580; *Churton v. Douglas* (1859) Johns. at p. 190, 70 E. R. at p. 391, 123 R. R. 65.

(*b*) *Jennings v. Jennings* [1898] 1 Ch. 378, 67 L. J. (Ch.) 190.

(*c*) See *Pearson v. Pearson* (1884) 27 Ch. D. 145, 54 L. J. (Ch.) 32, not overruled on this point.

On a dissolution without any special proviso naming or including goodwill, or restricting the use of the firm-name, either partner may use the old name, provided he does not thereby expose a former partner to any substantial risk. Whether there is such risk in the particular case, is a question of fact depending on the nature of the business and other circumstances (*d*).

Illustrations.

1. *A, B and C* have carried on business in partnership under the firm of *A and Co.* *A* retires from the firm on the terms of the other partners purchasing from him his interest in the business and goodwill, and *D* is taken in as a new partner. *B, C and D* continue the business under the firm of "*B, C and D late A and Co.*" *A* may set up a similar business of his own next door to them, but not under the firm of *A and Co.* (*e*).

2. One of several persons carrying on business in partnership having died, the affairs of the partnership are wound up by the Court, and a sale of the partnership assets, including the goodwill, is directed. The goodwill must not be valued on the supposition that any surviving partner, if he does not himself become the purchaser, can be restrained from setting up the same kind of business on his own account (*f*), for "no Court can prevent the late partners from engaging in the same business, and therefore, the sale cannot proceed upon the same principles as if a Court could prevent their so engaging" (*g*).

15. Subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business.

Application of the property of the firm.

Application of partnership property.—This corresponds to the latter part of sec. 20, sub-sec. 1, of the English Act, with slight verbal variation. It is to be read not as purporting to enact any specific rule, which it does not, but as declaring in a summary way a principle inherent in the nature of the partnership contract, which is worked out in the

(*d*) *Burchell v. Wilde* [1900] 1 Ch. 551, 69 L. J. (Ch.) 314, C. A.; *Townsend v. Jarman* [1900] 2 Ch. 698, 69 L. J. (Ch.) 823.

(*e*) *Churton v. Douglas* (1859) Johns. 174, 123 R. R. 56.

(*f*) *Hall v. Barrows* (1863) 4 D. J. S. at p. 159, 46 E. R. at p. 877, 146 R. R. 254.

(*g*) Lord Eldon's decree in *Cook v. Collingridge* (1825), given in 27 Beav. 456, 459, 54 E. R. 180, 23 R. R. 767. The declarations and directions there

inserted contain an exposition of the nature and legal incidents of goodwill which is still of high authority. See now on the position of a purchaser of goodwill, and the principles of valuation, per Romer, J. in *In re David and Mathews* (1899) 1 Ch. 378, 68 L. J. (Ch.) 185. As late as 1854 it was argued without success that goodwill was not property for the purpose of stamp duty on conveyance. *Potter v. Commrs. of Inland Revenue* (1854) 10 Ex. 147, 102 R. R. 511.

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detailed provisions of the Act. A fastidious draftsman might call it superfluous, but it is none the less useful for the instruction of unlearned persons who have to make use of the Act.

In a general way it is equally obvious that the partners, if all of one mind, can as between themselves do as they please with the firm's property, or authorize some or one of them to deal with it, and that no partner can, in the absence of an express agreement of all, go beyond his ordinary implied authority to act on behalf of the firm. In the absence of a contract to the contrary, no partner can point to any part of the partnership assets as belonging to him alone (h). The limits of that authority are declared in secs. 19 and 20, pp. 339-349 below.

16. Subject to contract between the partners—

(a) If a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm ;

(b) If a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

Compare secs. 29, 30 of the English Act and secs. 258, 259 of the Contract Act. Every partner being presumably an agent of the firm, the principle may be regarded as developed from or parallel to the stringent and universal rule in the law of agency that an agent must not deal on his own account or make any undisclosed profit for himself in the business of his agency (secs. 216, 218 of the Contract Act). The two clauses of the present section being branches of the same fundamental rule, their application is not always easily distinguishable.

Clause (a).—"It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partners from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection" (i).

This does not make him liable to account for profit made in an independent business, not competing with the firm's, in which information he has acquired as a partner has or may have been useful to him, not even if his undertaking any such business is a breach of the partnership articles entitling the other partners to damages or possibly a dissolution (j).

(h) *Ajudhia Pershad v. Sham Sundar*,
(1947) Lah. 417, (1947) A. L. 13.

(i) *Lindley, L. J., Aas v. Benham*

[1891] 2 Ch. 244, 255.

(j) *Dean v. MacDowell* (1878) 8 Ch.
Div. 345; *Aas v. Benham*, last note.

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Clause (b).—One or more persons may, with knowledge and consent of all parties, be members of two distinct firms carrying on a similar, if not a directly competing business, as where the two undertakings are a morning and an evening newspaper. In such a case members of a firm *A* who also belong to firm *B* are not entitled, though a majority in *A*, to use *A*'s special information for the purposes of *B* (*k*). There may be an express agreement not to engage in any business whatever other than the firm's, irrespective of competition. Breach of such an agreement, however, does not make the partner breaking it liable for an account of profits (*l*). In fact an agreement so expressed is only equivalent to the more usual form by which the promisor undertakes to give his whole time and attention to the firm's business.

17. Subject to contract between the partners—

(a) where a change occurs in the constitution of a firm, the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be ;

(b) where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they may be consistent with the incidents of partnership at will ; and

(c) where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Clauses (a) and (b).—This section covers the ground of sec. 255 of the Contract Act and sec. 27 of the English Act, but is more explicit and goes further : those sections purport to deal only with cases where a partnership contract made in the first instance for a fixed term has been continued after the expiration of the term without any new express agreement.

(*k*) *Glaslington v. Thwaites* (1823) 1 S. & St. 124, 24 R. R. 153. | (*l*) *Dean v. MacDowell*, note (*j*) above.

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Analogous questions may arise in other circumstances, as in a rather curious case where three partners carried on business for many years with no formal agreement at all, but only a memorandum appended to the annual accounts, to the effect that on the death of any partner his capital as shown by the amount should be paid out to his representatives and the business continued by the survivors (who were thus, in effect, bound to buy his share at that valuation). One of the three died and his capital was paid out accordingly : the survivors continued the business without any formal agreement, and without renewing the memorandum above mentioned, though not without some discussion ; on the decease of one of them the Court found on the whole facts that they had agreed, though not formally, to treat the memorandum as still in force (*m*). The present section is wide enough to include such cases under clause (*a*) ; the case of carrying on after the expiry of a fixed term is specifically dealt with by clause (*b*) in terms almost identical with those of the English Act, sec. 27 (*n*).

Clause (*a*) was applied to a case in which *A* and *B* were partners with ten annas and six annas share respectively. On the death of *A* his son stepped into his shoes and without any express agreement carried on the business with *B*. *A*'s son was entitled to ten annas share (*o*).

Clause (c).—Clause (*c*) seems to be a piece of rather abundant caution. We know no reason for suggesting that any extension of a firm's business, however considerable, is presumed to work any change in the terms of its constitution, beyond the addition of such provisions as may be plainly necessary for working the new adventure. On the other hand we know of no rule or principle to prevent the members of a firm from forming a new and distinct firm for some new purpose, even though it may be auxiliary to the old firm's business and under much the same management ; certainly this clause does not. And certainly things of that nature do happen, though it is more convenient and usual to attain the object by forming incorporated companies. The method and working of such schemes belong not to partnership but to company law.

It is thought that the following illustrations, taken from Sir F. Pollock's Digest of Partnership Law, pp. 92-93, may be found useful.

(*m*) *King v. Chuck* (1853) 17 Beav. 325, 99 R. R. 169. The case was argued and adjudged on the question of what the parties had agreed in fact, nothing being said about any presumption in law ; so it really decided no legal point whatever (as the headnote frankly discloses) and was not properly reportable. It is not reported elsewhere, as many others of the omnivorous Beavan's cases are not.

(*n*) Still there is a new agreement, and therefore the benefit of registration for income tax purposes can be obtained after the expiry of the term only by executing a new deed : *Krishna-Aiyar & Sons v. Commr. of Income Tax* (1928) 52 Mad. 367, 115 I. C. 254, A. I. R. 1929 Mad. 67.

(*o*) *Dawood Sahib v. Sheik Mohideen* (1937) 2 M. L. J. 760, 175 I. C. 766, A. I. R. 1938 Mad. 5.

Illustrations.

1. A clause in partnership articles entered into between *A* and *B* for a fixed term provides that "in case either of the said partners shall depart this life during the said co-partnership term" the surviving partner shall purchase his share at a fixed value. *A* and *B* continue their business in partnership after the expiration of the term. This clause is still applicable on the death of either of them (*p*).

2. Articles for a partnership for one year contain an arbitration clause, and the partnership is continued beyond the year. The arbitration clause is still binding (*q*).

3. *A* and *B* are partners for seven years, *A* taking no active part in the business. After the end of the seven years, *B* continues the business in the name, on the premises, and with the property of the firm, and without coming to an account. The partnership is not dissolved, and *A* is entitled to participate on the terms of the original agreement in the profits thus made by *B* (*r*).

4. Partnership articles provide that a partner wishing to retire shall give notice of his intention a certain time beforehand. If the partnership is continued beyond the original term, this provision does not hold good, as not being consistent with a partnership at will (*s*).

5. *A* and *B* enter into partnership for seven years, under articles which empower either partner, if the other neglects the business, to dissolve the partnership by notice, and purchase his share at a valuation. They continue in partnership after the seven years. This power of dissolution on special terms can no longer be exercised, as either party may now dissolve the partnership at will (*t*).

Where business continued by surviving partners.—The same rule has been substantially acted upon in the case of a business being continued by the surviving partners after the death of a member of the

(*p*) *Essex v. Essex* (1855) 20 Beav. 442, 52 E. R. 674; *Cox v. Willoughby* (1880) 13 Ch. D. 863, 49 L. J. (Ch.) 237; *Cookson v. Cookson* (1837) 3 Sim. 529, 59 E. R. 210, must be considered as not being law on the subject. *Yates v. Finn* (1880) 13 Ch. D. 839, does not break the current of authority, for the opinion there reported incidentally (the case being mainly on other points) on a more or less similar clause turns out to have been justified by the presence of special stipulations not applicable to a partnership at will. See *Daw v. Herring* [1892] 1 Ch. 284, 289; *Bhagwan v. Hiraji* (1932) 34 Bom. L. R. 1112, A. I. R. 1932 Bom. 516; *Rajindra Prosad v. Panna Lal*

Champa Lal (1931) 36 Cal. W. N. 8, 138 I. C. 348, A. I. R. 1932 Cal. 343; *Babu Kirparam v. Jawaharsing* (1932) 34 Bom. L. R. 737, A. I. R. 1932 Bom. 375 [award may be made against a firm].

(*q*) *Gillett v. Thornton* (1875) L. R. 19 Eq. 599, 44 L. J. (Ch.) 398.

(*r*) *Parsons v. Hayward* (1862) 4 D. F. J. 474, 45 E. R. 1267, 135 R. R. 249.

(*s*) *Featherstonhaugh v. Fenwick* (1810) 17 Ves. at p. 307, 34 E. R. 115, 11 R. R. at p. 81.

(*t*) *Clark v. Leach* (1862) 32 Beav. 14, 1 D. J. S. 409, 55 E. R. 6, 137 R. R. 247; see the M. R.'s judgment, 32 Beav. 21.

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original firm (*u*); the Court inferred as a fact from their conduct that the business was continued on the old terms; but it is probably safe to assume that here also, if there were nothing more than a want of evidence to the contrary, a continuance on the old terms would be presumed.

In the Scottish appeal of *Neilson v. Mossend Iron Co. (v)*, the House of Lords held that a clause providing for the optional retirement of any partner on special terms "three months before the termination of this contract" was not applicable to the partnership as continued after the expiration of the original term. But this decision was on the construction of "a strangely and singularly worded article" (per Lord Selborne, 11 App. Cas. at p. 304). Lord Watson affirmed the general rule that "when the members of a mercantile firm continue to trade as partners after the expiry of their original contract without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent, or, as it is termed in the law of Scotland, by 'tacit relocation.' The rule obtains in the case of many contracts besides that of partnership; and its legal effect is that all the stipulations and conditions of the original contract remain in force, in so far as these are not inconsistent with any implied term of the renewal contract." In this case, however, time was of the essence of the condition (*Ibid.* pp. 308, 311).

In a later case (*w*) it was held that a clause giving one partner an option of buying the other's share within three months "after the expiration or determination of the partnership by effluxion of time" did apply to the partnership as continued after the expiration of the original term, and that *Neilson v. Mossend Iron Co.* really confirmed the previous authorities.

(*u*) *King v. Chuck* (1853) -17
Beav. 325, 51 E. R. 1059, 99 R. R.
169.

(*v*) (1886) 11 App. Cas. 298.
(*w*) *Daw v. Herring* [1892] 1 Ch. 284,
61 L. J. (Ch.) 5 (Stirling, J.).

CHAPTER IV.

RELATIONS OF PARTNERS TO THIRD PARTIES

18. Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm. Sec. 18, 19

Agency.—This and the two following sections supersede sec. 251 of the Contract Act by a much more explicit statement which in form pretty closely resembles sec. 5 of the English Act. For obvious reasons the summary statement of principle in sec. 18 called for the expansion which is supplied in sec. 19, and these two closely connected sections are here dealt with together for the reader's convenience. In *Cox v. Hickman* (x) Lord Wensleydale said: "So if two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer." One of the tests of partnership is whether there was a binding contract of mutual agency between the partners (y).

Note that the firm is not presumed, conversely, to be an agent of the individual partners. Payment to one partner is in general a good payment to the firm; but payment to the firm of a private debt due to one partner is not a discharge unless it is shown that the firm had in fact authority to receive it (z).

19. (1) Subject to the provisions of sec. 22 (a), the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.

The authority of a partner to bind the firm conferred by this section is called his "implied authority."

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration (b),

(x) (1860) 8 H. L. C. 268, 312.
(y) *Janki Nath v. Dhokar Mal* (1935) 156 I. C. 200, A. I. R. 1935 Pat. 376.
(z) *Powell v. Brodhurst* [1901] 2 Ch. 160. And a finding on such questions of pure fact is not authority in any other case, though some reporters appear to think so; see e.g. *Mathura Nath v. Breejuckta Bageswari*, 106 I. C. 516, A. I. R.

1928 Cal. 57, 46 Cal. L. J. 362.
(a) As to the manner of doing acts in the firm's name.
(b) *Ram Bharose v. Kallu Mal* (1899) 22 All. 135, following English authorities; *Datoobhoy Hassam v. Vallu Mahomed* (1899) 1 Bom. L. R. 828; *Arunachela Iyah v. Louis Dreyfus & Co.* (1927) 107 I. C. 793, A. I. R. 1928 Mad. 107.

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- (b) open a banking account on behalf of the firm in his own name (c),
- (c) compromise or relinquish any claim or portion of a claim by the firm (d),
- (d) withdraw a suit or proceeding filed on behalf of the firm (d),
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immoveable property on behalf of the firm,
- (g) transfer immoveable property belonging to the firm, or,
- (h) enter into partnership on behalf of the firm.

Implied authority of partner.—The Contract Act said, one does not see why, that a partner has such authority as he would have if he were an expressly appointed agent of the firm. Sec. 18 has adopted the more direct method of the English Act and lays down that he is an agent. This is a clear improvement. The generality of a partner's authority as agent is not affected by the fact, where so it is, that two Hindu partners are brothers or otherwise members of a joint Hindu family. They are on the footing of equals for the purposes of partnership law (e).

(c) *Alliance Bank v. Kearsley* (1871) L. R. 6 C. P. 433.

(d) Although a partner is entitled to assign a decree in favour of the firm, he has not implied authority to assign such a decree for a lesser sum. This would amount to relinquishing a portion of the claim by the firm: *Krishnaji Bharamalji & Co. v. Abdul Razak* (1941) 43 Bom. L. R. 888, A. I. R. 1942 Bom. 22; *Nagappa v. Bhagwanji* (1936) 59 Mad. 1036, A. I. R. 1936 Mad. 593. Where by the partnership deed, a partner is appointed the general manager of the business with power "to negotiate with all persons for the purpose of the business" it gives him power to negotiate the settlement of a suit against the partnership. No question of implied authority under this section arises. *G. M. Shahani v. Haveri Trading Co. Ltd.*, 51 C. W. N. 488. Earlier conflicting authorities, if such there be, are clearly overruled by the plain words of these clauses; and we are not sure that the following observations are not superfluous.

The Special Committee seem, with all respect, to have been needlessly troubled about a case not regularly reported, now two centuries old, and known only

through a footnote in a text-book which is now a century out of date. By this time it would be forgotten if it were not (unfortunately, we think) mentioned in Lindley's text. It does not appear that the statement of it, purporting to come from some insufficiently described MS. collection, was properly vouched for. As stated, however, the decision did not profess to lay down any general rule, but did substantial justice in the particular circumstances. One of three partners brought an action in the names of all without authority or consent from the other two; those two, on being informed of the fact, agreed with the defendant to stay proceedings; the Court of King's Bench upheld the agreement as binding on all three on the ground that what one partner could do (if he could) the other two could undo. See Lindley, p. 354, citing a note in Gow on Partnership (1832) which has been consulted. That book is presumably not accessible in India; but it is no loss to any one at this day.

(e) See *Ghulam Mohammad v. Sohna Mal*, 101 I. C. 742, A. I. R. 1927 Lah. 385; *Debi Dayal v. Baldeo Prasad* (1928) 50 All. 982, 111 I. C. 143, A. I. R. 1928 All. 491.

The positive statement in sec. 19, sub-sec. 1, is as plain as words can make it, but its negative aspect, namely that a partner's implied authority extends only to the firm's usual business and not to anything unusual, needs the elucidation which sub-sec. 2 supplies. Sec. 20 adds an important protection for customers; they are entitled to presume that any partner has the usual implied authority, and to rely on it as binding the firm, notwithstanding any restriction agreed on among the partners, unless they have notice of that restriction. All this is in principle well settled law; previous judicial statements do not, of course, add anything to the force of the Act itself, but they may still be found instructive. We will now cite a few of them.

"Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes" (f).

"Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership" (g).

The general powers of partners as agents of the firm are summed up by Story in a passage which has been adopted by the Judicial Committee of the Privy Council (h) :—

"Every partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *praepositus negotiis societatis*, and may consequently bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership: he may borrow money, contract debts, and pay debts, on account of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure, to be discounted promissory notes, bills of exchange, cheques and other negotiable paper in the name and on account of the partnership."

As to the limits of a partner's implied authority specified in sec. 19, sub-sec. 2: The words making a general exception in favour of usage or

(f) Lord Westbury in *Ex parte Darlington, &c., Banking Co.; In re Riches* (1864) 4 De G. J. & S. 581, 585, 46 E. R. 1044, 146 R. R. 466, 469.

(g) James, L. J., in *Baird's Case* (1870)

L. R. 5 Ch. at p. 733.

(h) Story on Agency, sec. 124; *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. at p. 193, 13 E. R. at p. 657, 79 R. R. 53.

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custom of trade are due to the Select Committee, whose information showed that special usages of this kind are common: "in Calcutta particularly it is a trade custom that partners make contracts of sale containing a clause referring disputes to arbitration."

No substantial innovation is made by the Select Committee's amendment, for the existence of a well known usage in any trade carried on by a firm suffices, on the general principle governing the recognition of such usages, to raise a presumption that the partners intended to embody it as a part of their contract by understood though tacit adoption, especially where, as often happens, there are no formal partnership articles. Indeed the whole sub-section is a matter of presumptions, for the most part already well settled by judicial authority and common practice, for the purpose of narrowing the inevitable margin of disputes as to the burden of proof. Any underlying dispute of substance must always be in itself a dispute of fact.

"The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it usually is carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible" (i).

It must not be assumed that the list of matters not included in a partner's implied authority is exhaustive. Nothing is said about giving a guarantee in the name of the firm, but in English law it is certain that, even if it is in fact a reasonable and convenient thing in the particular case, no partner can bind the firm in this manner unless he is authorized by special agreement or it is allowed by general usage of firms engaged in that kind of business (j). No reason is known why it should be otherwise in India (k).

Still less, on the other hand, is it possible to enumerate the recognized and usual functions of partners as agents of the firm. It may be useful, however, to give shortly the results of authorities, including English decisions which presumably are applicable in India, with regard to some ordinary matters of business.

Although a partner may do an act on behalf of the firm which he is not authorised to do, it is open to the other partners to ratify the Act. On such ratification, such act becomes binding on the other partners as well (l).

(i) Lindley, p. 180.

(j) *Brettel v. Williams* (1849) 4 Ex. 623, 80 R. R. 726.

(k) This point does not appear to have been raised in *Surwalal v. Fazle Hussain* (1939) 179 I. C. 771, A. I. R.

1939 Nag. 31 where the other partners were held liable on the ground that the managing partner executed a surety bond on behalf of the firm.

(l) *Hanuman Chamber of Commerce v. Jassa Ram* ('49) A. E. F. 46.

Negotiable instruments.—In trading firms every partner has implied power to bind the firm if there is no agreement to the contrary; but a non-trading firm is not bound unless the issue of negotiable instruments by one partner is shown to be necessary or usual in the particular business (m). For this purpose brokers and commission agents are not traders (n), nor are cinematographic theatre owners (o).

When a negotiable instrument is regularly drawn by a partner in a trading firm in a transaction incident to the firm's business, another partner is not the less liable because his name does not appear on the face of the instrument (p).

Borrowing money.—Every partner in a trading firm has implied authority to borrow money for the purposes of the business or credit of the firm (q), except in the case, which can hardly occur in modern practice, of the partners being too many to conduct business in the ordinary manner of a firm.

Non-trading firm and borrowing.—Though a business may not be of a commercial nature, the fact that the money borrowed by one partner has been applied for the purposes of the business is sufficient to make the other partners liable (r).

Purchase.—A partner may buy on the credit of the firm any goods of a kind used in its business, and the firm will be bound, notwithstanding any subsequent misapplication of them by that partner (s). This power extends to non-trading partnerships (t).

Hire.—A partner may hire on the credit of the firm any goods of a kind used in its business, and the firm will be bound by the terms of the contract of hire. Thus, where a partner hired an elephant to trap wild elephants which was the business of the firm, and one of the terms was that the hirer should pay Rs. 5,000 if the elephant died during the period of hire, it was held that the other partners were bound by that term (u).

Payment to and release by one partner.—Payment to one partner is a good payment to the firm (v), and by parity of reason a release

(m) Lindley, 187.

(n) *Yates v. Dalton* (1858) 28 L. J. Ex. 69, 118 R. R. 896.

(o) *Higgins v. Beauchamp* [1914] 3 K. B. 1192.

(p) *Bunarsee Dass v. Gholam Hossein* (1870) 13 M. L. A. 358; *Moti Lal v. Unao Commercial Bank* (1930) 32 Bom. L. R. 1571.

(q) *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. 152, 194, 77 R. R. 24, 53; *Mauw Pe Thaung v. Toungoo Timber Co.* (1932) 10 Rang. 204, 138 L. C. 210, A. I. R. 1932 Rang. 118; *Saremal Punamchand v. Kapurchand Punam-*

chand (1923) 48 Bom. 176, 77 I. C. 548, A. I. R. 1924 Bom. 260; *Hari Shankar v. Bansilal* (1946) Nag. 301, (1946) A. N. 286.

(r) *Reversion Fund and Insurance Co., Ltd. v. Maison Cosway, Ltd.* [1913] 1 K. B. 634; *Gordhandas v. Raghovirdasji* (1932) 34 Bom. L. R. 1137, A. I. R. 1932 Bom. 539.

(s) *Bond v. Gibson* (1808) 1 Camp. 185, 10 R. R. 665.

(t) Lindley, 203.

(u) *Mathura Nath v. Sreejukt Bageshwari* (1927) 46 Cal. L. J. 362.

(v) Lindley, 192.

- S. 19** by one partner binds the firm, "because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment" (w).

Servants.—"One partner has implied authority to hire servants to perform the business of the partnership," and probably also to discharge them if the other partners do not object (x).

Lease or mortgage.—The High Court of Bombay has held that where one partner takes a lease of premises in his own name, though on behalf of the partnership, and with the assent of the other partners, the latter are not liable to be sued by the lessor for the rent reserved by the lease (y). The decision proceeds on the ground that a lease is not a mere contract, but a conveyance by way of demise, and the person covenanting to pay the rent is the person to whom the demise is made only. The better opinion, however, would seem to be that the other partners are liable for the rent, though their names do not appear on the lease, provided the lease was taken for the partnership, and this accords with the view of the Madras High Court in a later case (z). It has been held by the Judicial Committee that a mortgage of a village which was partnership property made by some of the partners for the benefit of the firm is binding on a member of the firm though not executed by him (a). In a Madras case (b) Wallis, J., after referring to that case, said, "If, as held, I think rightly, in that case, a partner in India can mortgage partnership property by deposit of title deeds, there is, I think, no good reason why he should not effect a legal mortgage as well. The observation of Straight, J. in *Harrison v. Delhi and London Bank* (c), that in India the presumption is against the existence of such a power, was made in the case of a partnership between Englishmen, and I am unable to agree with it, especially as applied to natives of India." This opinion is now confirmed by the Judicial Committee as to a managing partner (d). It is submitted that the custom may be taken as settled, and therefore preserved by the Act.

A purchaser of immoveable property cannot be required to assume that one partner is authorized to execute a release or reconveyance in the name of the firm (e).

(w) Best, C. J. in *Stead v. Salt* (1825) 3 Bing. at p. 103, 130 E. R. 453, 28 R. R. 603, 604.

(x) Lindley, 205.

(y) *Ragoonathdas v. Morarji* (1892) 16 Bom. 588, citing *Walters v. Northern Coal Mining Co.* (1855) 5 De. G. M. & G. 629, 104 R. R. 232.

(z) *Chinnaramanuja v. Padmanabha* (1898) 19 Mad. 471, 476.

(a) *Juggeewundas v. Ramdas* (1841)

2 M. I. A. 487.

(b) *Asan Kani v. Somasundaram* (1908) 31 Mad. 206.

(c) 4 All. 437, 459.

(d) *Jafferli Bhaloo Lakha v. Standard Bank of S. Africa* (1927) 107 I. C. 453, A. I. R. 1928 P. C. 135.

(e) *Hirachand Amersey v. Jayagopal Gangabishan* (1924) 49 Bom. 245, 267, 80 I. C. 553, A. I. R. 1925 Bom. 69.

The manager of a joint Hindu family can bind the other co-partners by a mortgage of family property executed in his own name for the purpose of carrying on the family business (f).

Partner's abuse of firm's credit.—When the ordinary limits of a partner's authority have been stated, there appears no obvious need for saying in terms that acts on the face of them outside those limits do not bind the firm. The English Act, however, does say this in a declaration of the law (sec. 7, below) to which nothing in the present Act corresponds, and adds a caution in which the real point of the section lies, to the effect that another member or members of the firm may have incurred personal liability to the creditor by somehow giving him reasonable cause to believe that the acting partner in fact had authority. Such liability would be in the nature of an individual estoppel and not really peculiar to the law of partnership. No actual example is known, but the thing has been suggested in English judgments of high authority. From the same judgments it may be collected that otherwise belief, even if reasonable in itself, that the acting partner had the firm's authority would not of itself serve the creditor. Certainly it does not seem just that a third person's mistake, however honest, should improve his position against a partner who did nothing to contribute to it. Inasmuch as one effect of the present Act may be to make reference to the English Act more frequent in Indian Courts, it is thought desirable to set out the section in question (which taken alone might be perplexing) and the editor's comment already published in England.

English Partnership Act, sec. 7.—Sec. 7 of the English Partnership Act, 1890, is as follows :—

“ 7. Where one partner pledges the credit of the firm for a purpose
Partner using credit of firm for private purposes. apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners ; but this section does not affect any personal liability incurred by an individual partner.”

Sec. 7 sums up the effect of long accepted authorities, and seems purposely to leave an unsettled point where it was.

The passage already partly cited from Story continues as follows :—

“ The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm ; and therefore his acts beyond that business will not bind the firm. Neither will his

(f) *Bemola v. Mohun* (1890) 5 Cal. 792. We purposely abstain from referring to English decisions involving the technicalities of English real property law.

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acts done in violation of his duty to the firm bind it when the other party to the transaction is cognizant of or co-operates in such breach of duty" (g).

Persons who "have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it" (h), cannot say that they were misled by his apparent general authority. For his authority presumably exists for the benefit and for the purposes of the firm, not for those of its individual members. The commonest case, indeed the only case at all common, to which this principle has to be applied, is that of one partner giving negotiable instruments or other security in the name of the firm to raise money (to the knowledge of the person advancing it) for his private purposes or for the satisfaction of his private debt (i).

"The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the authority of the rest, or at least that he himself had reason to believe so" (j).

"If a person lends money to a partner for purposes for which he has no authority to borrow it on behalf of the partnership, the lender having notice of that want of authority cannot sue the firm" (k).

"When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership—that he is going beyond the scope of his agency; and express authority therefore is necessary from the other partner to warrant that payment" (l).

Whether the creditor may be entitled as against the firm by reasonable belief in the partner's authority.—It is doubtful whether a separate creditor thus taking partnership securities or funds from one partner is justified even by having reasonable cause to believe

(g) Story on Agency, Sec. 125; *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. at p. 194, 79 R. R. 53.

(h) *Ex parte Darlington, &c., Banking Co.*; *In re Riches* (1864) 4 De G. J. & S. at p. 585, 146 R. R. 469.

(i) See the cases referred to in the next note, and *Heilbut v. Nevill* (1869-70) L. R. 4 C. P. 354, in *Ex. Ch.* 5 C. P. 478.

(j) Smith, Merc. Law, 43 (9th ed.), adopted by Keating and Byles, J. J. in *Levison v. Lane* (1862) 13 C. B. N. S.

278, 32 L. J. C. P. 10; by Lord Westbury, in *Ex parte Darlington, &c., Banking Co.*; *In re Riches* (1864) 4 De G. J. & S. at p. 585, 146 R. R. 469; and by Cockburn, C. J. (subject to a doubt as to the last words), in *Kendal v. Wood* (1871) (Ex. Ch.) L. R. 6 Ex. at p. 248, 39 L. J. Ex. 167.

(k) *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. at p. 196, 79 R. R. 55.

(l) Montague Smith, J., in *Kendal v. Wood* (1871) L. R. 6 Ex. at p. 253.

in the existence of a special authority; the opinion has been expressed by Cockburn, C. J. that he deals with him altogether at his own peril (*m*). But it may happen that the other partner whom the separate creditor seeks to bind has so conducted himself as to give reasonable ground for supposing there is authority; and where he has done so, he may be personally bound on the general principle of estoppel. The rule is stated with this qualification or warning by Blackburn, J., and Montague Smith, J. (*n*). And this case appears to be contemplated by the final clause of the section, which, however, it will be observed, does not positively impose or declare any liability.

Instances of the general rule.—Another special application of the rule declared by sec. 7, of the English Act, was made in a case where two out of three partners gave an acceptance in the name of the firm for a debt incurred before the third had entered the partnership. This was held not to bind the new partner, for it was in effect the same thing as an attempt by a single partner to pledge the joint fund for his individual debts (*o*).

Again, if a customer of a trading firm stipulates with one of the partners for a special advantage in the conduct of their business with him, for a consideration which is good as between himself and that partner, but of no value to the firm, the firm is not bound by this agreement, and incurs no obligation in respect of any business done in pursuance of it (*p*).

The same principle applies to the rights of persons taking negotiable instruments indorsed in the name of the firm. Where a partner authorized to indorse bills in the partnership name and for partnership purposes indorses a bill in the name of the firm for his own private purposes, a holder who takes the bill, not knowing the indorsement to be for a purpose foreign to the partnership, can still recover against the other partners, notwithstanding the unauthorized character of the indorsement as between the partners (*q*); but if he knows that the indorsement is in fact not for a partnership purpose he cannot recover (*r*).

The same principle is applicable in the case (among others) of a partner raising money on the credit of the firm in such circumstances that the lender knows the loan to be intended for the borrower's private use and not for partnership purposes. In such a case the separate creditor must know that the partner is acting outside his normal authority, and therefore he cannot hold the firm liable unless there is in fact express authority from

(*m*) L. R. 6 Ex. 248, 39 L. J. Ex. 167.

(*n*) L. R. 6 Ex. at pp. 251, 253.

(*o*) *Shirreff v. Wilks* (1800) 1 East. 48, 102 E. R. 19, 5 R. R. 509; see per Le Blanc, J.

(*p*) *Bignold v. Waterhouse* (1813) 1 M. & S. 255.

(*q*) *Lewis v. Reilly* (1841) 1 Q. B. 349, 55 R. R. 262.

(*r*) *Garland v. Jacob* (1873) L. R. 8 Ex. 216 (Ex. Ch.). See also our comment on sec. 188 of the Contract Act (ed. Pollock and Mulla, pp. 564, 565).

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the other partners (*s*). Will reasonable belief in the existence of express authority be enough to justify the creditor in holding the firm liable? On principle it would seem not, except so far as that belief may have been induced by the conduct of all or some of the other partners, in which case those who have so acted may well be liable personally, having in effect held out the borrowing partner as authorized. But "the mistaken belief that the one partner had that authority" (to appropriate money coming from partnership funds to his private account) "cannot prejudice the right of the other, if the other did nothing to induce such a belief" (*t*). Similarly an indorsement of a negotiable instrument by one partner in the name of the firm, but without authority and for his own private purposes, confers no title on an indorsee having notice of the purpose and no reason to believe that there is authority (*u*).

Generally it must be understood that partners, known or unknown, are bound only by what is done on behalf of the firm; even if the firm has the use of money borrowed by a partner in his own name, this is at most evidence, but not conclusive, to show that the borrowing was in fact on account of the firm (*v*).

20. The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Extension and restriction of partner's implied authority.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

The second paragraph of this section corresponds in substance to the exception to sec. 251 of the Contract Act and the closely similar sec. 5 of the English Act, but is cast in a different form and embodies the effect of sec. 8 of that Act.

In the words of the Special Committee, "Every person dealing with a firm is entitled to assume that all the partners wield the full implied authority, subject only to such restrictions as have been brought within his knowledge." On the other hand, it is equally just that known restrictions should be regarded.

The case of a partner having neither real nor apparent authority—that is, not being authorized in fact and not known or believed to be a

(*s*) *Kendal v. Wood* (1871) in Ex. Ch., L. R. 6 Ex. 248, at p. 253, per Montague Smith, J.

(*t*) *Ibid.*, per Lush, J., at p. 254.

(*u*) *Garland v. Jacomb* (1873) L. R. 8 Ex. 216, Ex. Ch.

(*v*) *Ram Chandra Sahu v. Kasem Khan* (1923) 28 C. W. N. 824, 81 I. C. 513, A. I. R. 1925 Cal. 29.

partner by the person he is dealing with—is now expressly dealt with, following the English Act. There is no reason to think that the law was formerly otherwise. The converse case of a partner dealing in his own name and the firm being in fact his undisclosed principal is too remote from any usual or probable practice to call for further or other remark, save that it would be dealt with, if it occurred, according to the ordinary rules of agency.

It has been suggested by high authority (*w*) that there may be restrictive agreements among partners which are only, so to speak, internal agreements for penalty or indemnity to be paid by a partner if he does certain things, but do not deprive him of his authority to bind the firm towards third persons if nevertheless he does them. It would seem, with great respect, that if such an argument is ever urged in practice the Court must consider, with regard to the terms or circumstances in the particular case, whether there is or is not an agreement restraining the power of the partner in question to bind the firm. It is a question of construction for which no rule can be laid down beforehand, and which perhaps is not very likely to arise.

21. A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.

Authority in emergency.—By sec. 13, cl. (e), the partner doing an act of this kind is entitled, subject to any special agreement, to be indemnified by the firm, but nothing is said about the firm's position with regard to other parties. By sec. 189 (x) of the Contract Act an agent is authorized, in an emergency, to do such acts, described in practically the same terms (see Pollock and Mulla, p. 573). It is by no means clear that, notwithstanding the limitations laid down by sec. 19, this authority does not, by virtue of sec. 18, extend to the case of a partner. The Select Committee assumed that the present section makes an innovation; but whether it does or not, the terms are clear and leave no doubt for the future. If it is asked why the firm's liability to indemnify the acting partner is not sufficient for practical purposes, the answer is that cases may occur where the necessary action could not be taken at all without pledging the firm's credit. Note, however, that the agent of a principal whose business does not include borrowing money is held in England to have no authority to borrow money on the principal's

(*w*) Lindley, 241 *seq.*

(*x*) The number 212 in the Special

Committee's note is a slip of the pen for 189.

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21-23**

credit even in emergency to enable the business to be carried on (y). The authority of the master of a ship is expressly distinguished as being founded on the peculiar character of maritime risks. Still the doctrine of agency of necessity cannot at this day be confined to any enumerable classes of business (z); and it seems to be at least arguable in India that decisions purporting to lay down any such limitations are not consistent with the comprehensive words of the enactment before us, and therefore are not to be followed in Indian courts.

22. In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

Mode of doing act
to bind firm.

This section is equivalent to sec. 6 of the English Act, which adds that general rules relating to the execution of deeds or negotiable instruments were not to be affected. A similar proviso in the Special Committee's draft was deleted by the Select Committee as needless. It has been laid down in England that "sec. 5 of the Partnership Act was not intended to, and does not, overrule sec. 4 of the Statute of Frauds" (a), and accordingly will not dispense with the need, in an agreement within that enactment, for a sufficient memorandum in writing identifying the party or parties to be bound. There is no reason to doubt that the analogy of this decision is applicable in India; or that here, as in England, a document authorized in fact will have whatever effect; compatible with its actual form it is capable of having, although it claims to be some other kind of instrument and does not clearly make that claim good (b).

23. An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business.

Effect of ad-
missions by a
partner.

Admission by partner.—This is almost identical with sec. 15 of the English Act. The matter of it is a necessary branch of a partner's

(y) *Hawtayne v. Bourne* (1841) 7 M. & W. 595, 56 R. R. 806. Cp. *Simpson's Claim* (1887) 36 Ch. D. 532, where necessity in fact was not proved.

(z) See the careful discussion by McCordie, J. in *Prager v. Blatspiel, Stamp and Heacock, Ltd.* [1924] 1 K. B. 366. Here again the evidence of necessity broke down.

(a) *Keen v. Mear* [1920] 2 Ch. 574, 581.

(b) *Re Briggs & Co.* [1906] 2 K. B. 209. The particular technical difficulty of an instrument purporting to be the deed of two partners but being executed only by one (the substance of the transaction being within his authority) cannot, of course, occur in India.

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general authority. As to admissions in general and their effect, see the Evidence Act I of 1872, secs. 17-23 (c). Inasmuch as a partner's admission is no more than evidence against himself, it is not conclusive, though relevant, as against the firm (d). It is an elementary qualification of this rule (if it is really a qualification) that a partner's statement about the extent of his authority can add nothing to the authority he has in fact; for otherwise he could bind the firm to anything merely by representing himself as authorized to do so (e).

Acknowledgment of debt by a partner.—The mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner unless it can be shown that he had authority, express or implied, to do so. According to Calcutta, Bombay and Allahabad decisions, such authority is to be presumed in a going mercantile concern as an ordinary rule (f). According to the Madras decisions, evidence of authority from the other partners is necessary and cannot be presumed (g). After dissolution, however, express authority must be proved (h), except, it must be remembered, when a partner is exercising the power given by sec. 47 (cp. English P. A., sec. 38). See Indian Limitation Act, 1908, sec. 21.

24. Notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Effect of notice to acting partner.

This is all but verbally identical with sec. 16 of the English Act; the substance is well settled law. Actual notice must be shown, not a mere speculative constructive notice (i).

(c) As to the effect of the Limitation Act, secs. 21 and 22, on an acknowledgment made by one partner, see *Mahadeva Iyer v. Rama-Krishna Iyer*, 50 Mad. L. J. 67, 92 I. C. 653, A. I. R. 1926 Mad. 114. The better opinion is that it does not invalidate acknowledgments which are really in the business of the firm.

(d) *Stead v. Salt* (1825) 1 Bing. at p. 103, 23 R. R. 604.

(e) *Ex parte Agace* (1792) 2 Cox 312, 2 R. R. 49.

(f) *Bengal National Bank, Ltd. v. Jatindra Nath Mazumdar* (1929) 56 Cal. 556, A. I. R. 1929 Cal. 714; *Premji v. Dossa*, (1886) 10 Bom. 358; *Dalsukhram v. Kalidas* (1902) 26 Bom. 42; *Gadoo Bibi v. Parshotam* (1888) 10 All. 418. In *Dalsukhram v. Kalidas*, Candy, J. referred with approval to Scott, J.'s ruling in *Premji v. Dossa*, but the Court eventually sent down an issue whether

the acknowledgment was or was not an act necessary for or usually done in carrying on the business of the partnership.

(g) *Valasubramania v. Ramanathan* (1908) 32 Mad. 421; *Shaik Mohideen v. Official Assignee of Madras* (1911) 35 Mad. 142, 11 I. C. 332; *K. R. V. Firm v. Seetharamaswami* (1914) 37 Mad. 146, 152, 21 I. C. 634; *Veeranna v. Veerabhadraswami* (1918) 41 Mad. 427, 45 I. C. 18.

(h) *Premji v. Dossa* (1886) 10 Bom. 358; *Rajagopala v. Krishnasami* (1898) 8 Mad. L. J. 261.

(i) *Re Coasters, Ltd.* [1911] 1 Ch. 86; *Rampal Singh v. Balbhadar Singh* (1902) 25 All. 1, 17, 29 I. A. 203; *Morumal v. Gobindram* (1933) 144 I. C. 452, A. I. R. 1933 Sind 176. Cf. sec. 3, Explanation III of the Transfer of Property Act, 1882.

**Sec.
24-26**

There is a curious but (so far as can be inferred from the absence of authority) hardly a practical question whether an incoming partner carries with him into the firm, so to speak, knowledge of facts acquired by him before he became a partner. More than half a century ago Sir G. Jessel threw out a suggestion that such knowledge might be held to be notice to the firm (j).

The exception is too obvious to common sense to call for comment. A partner who is defrauding the firm will certainly not inform his partners of any fact tending to expose the fraud, but on the contrary will do his best to conceal it.

25. Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Liability of a partner for acts of the firm.

This agrees with the law of Scotland and with what was commonly supposed to be the English rule until the House of Lords decided in 1879 (k) that during a partner's life his liability is only joint, though after his death his estate can be held liable (but not in competition with his separate creditors) for debts to the firm contracted while he was a partner and remaining unsatisfied. We have nothing to do in India with the results of that decision in England. The rule which it rejected had been supposed by the framers of the Indian Contract Act to be good English law, and was expressed by them in sec. 249 of the Act. The present Act repeats it in a more concise and emphatic form.

It will be remembered that under sec. 43 of the Contract Act joint promises of every kind create a joint and several obligation in the absence of express agreement to the contrary.

26. Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.

Liability of the firm for wrongful acts of a partner.

This is identical, but for minute verbal variation, with sec. 10 of the English Act.

Ground of liability; usage of firm, how material.—The principle of this section is a branch of the universal rule that every one must answer for the acts and defaults of his servants or agents in the course

(j) *Williamson v. Barbour* (1877) 9 Ch. D. at p. 535. | (k) *Kendall v. Hamilton*, 4 App. Cas. 504.

of their employment. For the general illustration of this rule the text-books on the Law of Torts may be consulted. As regards the application of it now before us, the chief difficulty that occurs in practice is that of knowing whether the neglect or fraud of a partner really took place "in the management of the business of the firm," or was only his own particular wrong, for which his position in the firm gave him an opportunity (l). Where the default consists, as it usually does, in the misappropriation of money which a customer or client was minded to entrust to the firm, it is material to consider whether it ever came into the firm's custody; for in this case the firm is liable for misappropriation by a partner, whether he was the partner originally trusted or not, and whether he acted in the exercise of apparently regular authority or not (English P. A., sec. 11). Further the question whether a partner was acting on behalf or with the ostensible authority of the firm can seldom be answered except by reference to the expectations created either by the special usage of that firm, or by what is usual in that kind of business generally. Depositing securities with a banker for safe custody will make his firm responsible for a misappropriation of them; but putting money in the hands of one member of a banking firm to be invested at his discretion will not; for the former transaction is within the scope of what bankers in England habitually do for their customers, the latter is outside it (m). Similar distinctions hold where solicitors are employed in money matters. Receipt of money with instructions to invest it in a specific manner binds the firm, as being in the ordinary way of solicitors' business (n), but if the instructions are general to invest at the solicitor's discretion, it does not (o). But a particular firm may widen its responsibility by habitually undertaking particular kinds of business for its clients (p).

A firm may also be liable for money which has come into its funds by the irregular or fraudulent act of either a partner (q) or an agent who is not a partner (r), and this whether the act was in the ordinary course of business or not, at all events if the partners knew or might have known of the payment and its source. But this does not really depend on anything specially belonging to the law of partnership.

In an English case one of two partners bribed the clerk of the plaintiff who was a competitor of the firm, to disclose certain information as to the

(l) See *Munshi Basiruddin Mullick v. Surja Kumar Naik* (1908) 12 C. W. N. 716, at p. 719.

(m) Contrast *Clayton's Case* (1816) 1 Mer. 572, 579, with *Bishop v. Countess of Jersey* (1854) 2 Drew. 143, 100 R. R. 51.

(n) *Blair v. Bromley* (1847) 2 Ph. 354, 71 R. R. 213.

(o) *Harman v. Johnson* (1853) 2 E. & B. 61, 95 R. R. 429.

(p) *Rhodes v. Moules* [1895] 1 Ch.

236 C. A.

(q) *Marsh v. Keating* (1834) 1 Bing. N. C. 198, 2 Cl. & F. 250, 289, 37 R. R. 75, 106; *Hurruck Chand v. Gobind Lal Khetry* (1906) 10 C. W. N. 1053 (where one of two partners who dealt in piece-goods stole piece-goods, the property of a merchant, and credited the sale proceeds to the firm).

(r) *Reid v. Rigby & Co.* [1894] 2 Q. B. 40.

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26, 27**

plaintiff's operations which as between him and his employer was confidential; it was in the course of the firm's business to obtain such information by proper means. Both partners were held liable to the plaintiff (s).

It has been said in the Bombay High Court that a malicious prosecution by the managing partner of a firm does not render the other members of a firm liable in damages, unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it (t). The result in this particular case may well be right, on the ground of want of authority, either general or special, and the language of the Court may have been appropriate in the circumstances, but it is submitted that this cannot be relied on as a general test. If a prosecution was undertaken on behalf of a firm by a member of it (or any other agent) having general authority to prosecute on behalf of the firm in a proper case; if the prosecutor was acting with a view, however perverse or erroneous, to the interest of the firm, and not merely for his private purposes; and if the prosecution was in fact malicious in the sense of being undertaken without reasonable cause, and in order to damage a person obnoxious to the firm rather than to advance justice, then, it is conceived, the partners in the firm would be liable, according to principle and the English authorities, whether at the time they knew anything of the prosecution or not (u).

Wrongful employment of trust property by a trustee in a business in which he is a partner is specially dealt with by the Trusts Act, 1882, sec. 67, with which compare English P. A., sec. 13.

27. Where—

Liability of firm for misapplication by partners. (a) a partner acting within his apparent authority receives money or property from a third party and misapplies it, or

(b) a firm in the course of its business receives money or property from a third party, and the money or property is misapplied by any of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

This is in like manner all but identical with sec. 11 of the English Act.

Liability of firm for misapplication by partner.—Accordingly the greater part of Sir F. Pollock's commentary on that section is now

(s) *Hamlyn v. Houston & Co.* [1903] 1 K. B. 81, C. A.

(t) *Ahmedbhai v. Framji* (1903) 28 Bom. 226.

(u) This conclusion seems to follow

a fortiori from the rule, now settled (*Citizen's Life Assurance Co. v. Brown* [1904] A. C. 423), that a corporation may be sued for malicious prosecution.

reproduced. It will be observed that in several English cases the peculiarities of an English solicitor's business, and of the special jurisdiction exercised over him as an officer of the Court, are involved. Care must be taken not to suppose that such purely English incidents are literally applicable in India; but they may be valuable by way of analogy if used with caution.

Illustrations.

1. *A*, *B* and *C* are partners in a bank, *C* taking no active part in the business. *D*, a customer of the bank, deposits securities with the firm for safe custody, and these securities are sold by *A* and *B* without *D*'s authority. The value of the securities is a partnership debt for which the firm is liable to *D*; and *C* or his estate is liable whether he knew of the sale or not (*v*). ✓

2. *A* and *B* are solicitors in partnership. *C*, a client of the firm, hands a sum of money to *A* to be invested on a specific security. *A* never invests it, but applies it to his own use. *B* receives no part of the money and knows nothing of the transaction. *B* is liable to make good the loss, since receiving money to be invested on specified securities is part of the ordinary business of solicitors (*w*).

3. If, the other facts being as in the last illustration, *C* had given the money to *A* with general directions to invest it for him, *B* would not be liable, since it is no part of the ordinary business of solicitors to receive money to be invested at their discretion (*x*).

4. *J* and *W* are in partnership as solicitors. *P* pays £1,300 to *J* and *W* to be invested on a mortgage of specified real estate, and they jointly acknowledge the receipt of it for that purpose. Afterwards *P* hands over £1,700 to *W* on his representation that it will be invested on a mortgage of some real estate of *F*, another client of the firm, such estate not being specifically described. *J* dies, and afterwards both these sums are fraudulently applied to his own use by *W*. *W* dies, having paid interest to *P* on the two sums till within a short time before his death, and his estate is insolvent. *J*'s estate is liable to make good to *P* the £1,300, with interest from the date when interest was last paid by *W*, but not the £1,700 (*y*). *Just*

(*v*) *Devaynes v. Noble*, *Clayton's Case* (1816) 1 Mer. at pp. 572, 579, 35 E. R. at p. 780, 15 R. R. 161.

(*w*) *Blair v. Bromley* (1847) 2 Ph. 354, 41 E. R. 979, 71 R. R. 213. Cases of this kind do not depend on the law relating to trusts, and are therefore not within sec. 8 of the Trustee Act, 1888 (as to the Statute of Limitations). *Qu.*

whether, supposing that section applicable, they would not be within the exceptions: *Moore v. Knight* [1891] 1 Ch. 547, 60 L. J. (Ch.) 271.

(*x*) *Harman v. Johnson* (1853) 2 E. & B. 61, 22 L. J. (Q. B.) 297, 118 E. R. 691, 95 R. R. 429.

(*y*) *Plumer v. Gregory* (1874) L. R. 18 Eq. 621.

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5. *A* and *B*, solicitors in partnership, have by the direction of *C*, a client, invested money for him on a mortgage, and have from time to time received the interest for him. *A* receives the principal money without directions from *C*, and without the knowledge of *B*, and misapplies it. *B* is not liable, as it was no part of the firm's business to receive the principal money; but if the money when repaid had been passed through the account of the firm, *B* would probably be liable (z).

6. *A*, one of the partners in a banking firm, advises *B*, a customer, to sell certain securities of *B*'s which are in the custody of the bank, and to invest the proceeds in another security to be provided by *A*. *B* sells out by the agency of the bank in the usual way, and gives *A* a cheque for the money, which he receives and misapplies without the knowledge of the other partners. The firm is not liable to make good the loss to *B*, as it is not part of the ordinary business of bankers to receive money generally for investment (a).

7. A customer of a banking firm buys stock through the agency of the firm, which is transferred to *A*, one of the partners, in pursuance of an arrangement between the partners, and with customer's knowledge and assent but not at his request. *A* sells out this stock without authority, and the proceeds are received by the firm. The firm is liable to make good the loss (b).

8. A customer of a banking firm deposits with the firm a box containing securities. He afterwards authorizes one of the partners to take out some of these and replace them by certain others. That partner not only makes the changes he is authorized to make in the contents of the box, but makes other changes without authority, and converts the customer's securities to his own use. The firm is not liable to make good the loss, as the separate authority given to one partner by the customer shows that he elected to deal with that partner alone and not as agent of the firm (c).

9. *A*, one of the partners in a bank under the firm of *M & Co.*, forges a power of attorney from *B*, a customer of the bank, to himself and the other partners, and thereby procures a transfer of stock standing in *B*'s name at the Bank of England. The proceeds of the stock are

(z) *Sims v. Brutton* (1850) 5 Ex. 802, 20 L. J. Ex. 41, as corrected by Lord Lindley's criticism, Lindley, 225, 226. Cp. *Cleather v. Twisden* (1883) 28 Ch. Div. 340, 54 L. J. (Ch.) 408; *Cooper v. Prichard* (1883) 11 Q. B. Div. 351, 52 L. J. (Q.B.) 526; *Rhodes v. Moules* [1895] 1 Ch. 236, 64 L. J. (Ch.) 122, C. A., where the securities misappropriated by one partner were of a class habitually held by the firm for their clients, and the firm

was therefore liable.

(a) *Bishop v. Countess of Jersey* (1854) 2 Drew. 143, 61 E. R. 673, 100 R. R. 51.

(b) *Devaynes v. Noble, Baring's Case* (1816) 1 Mer. at pp. 611, 614, 35 E. R. at p. 794, 15 R. R. 169.

(c) *Ex parte Eyre* (1842) 1 Ph. 227, 41 E. R. 618, 65 R. R. 375, Cp. the remark of James, V.-C., L. R. 7 Eq. 516 (1869).

credited to M & Co. in their pass-book with another bank, but there is no entry of the transaction in M & Co.'s own books. The other partners in the firm of M & Co. are liable to B, because it is within the scope of the firm's business to sell stocks for its customers, and to receive the proceeds of the sale, and the sale took place and the money was received in the usual way [and because they might by the use of ordinary diligence have known of the payment and from what source it came] (d).

10. W and J are solicitors in partnership. A, B and C, clients of the firm, have left moneys representing a fund in which they are interested in the hands of the firm for investment. After some delay a mortgage made to W alone is, with the consent of A, B and C, appropriated as a security for this fund. W realizes the security, and misapplies the money without the knowledge of J. The firm is not liable, as A, B and C dealt with W, not as a solicitor but as a trustee, and the breach of duty did not happen while the money was in the hands of the firm (e). But if there were facts showing that A, B and C dealt with W as a member of the firm, and the matter of the investment was treated as the business of the firm, the firm would be liable (f).

11. J and G are solicitors in partnership. G is secretary to a company. The company purchases land through J and G as its solicitors, instructing them not to disclose the name of their client, and, in accordance with a resolution of the company, the conveyance is made to G in his own name. G keeps the conveyance in his own custody, mortgages the property therein comprised to a lender in good faith, and applies the money to his own use. J is not liable to the company, for it was by the company's own act alone that G had the legal estate and the custody of the deed. It makes no difference that the profits of G's secretaryship were included in the partnership, for it was not part of the secretary's duty to act as trustee of the company's property (g).

(d) *Marsh v. Keating* (1834) 2 Cl. & F. 250, 289, 6 E. R. 1149, 37 R. R. 75, 106; *cp.* Lord Lindley's comments, *Lindley*, 230. If his comment is right, as it clearly is, one can hardly see what the knowledge or means of knowledge of the partners had to do with it; they were liable because money representing their customer's property had come, in an apparently regular course, though in truth by wrong, into the custody of the firm. The point is treated as material in the opinion of the judges, but seems at this day to be so only in cases where the transaction is not in the ordinary course of business.

(e) *Coomer v. Bromley* (1852) 5 De G. & Sm. 532, 64 E. R. 1230, 90 R. R.

131; and see a fuller account of the case in *Lindley*, 228.

(f) *Cleather v. Twisden* (1883) 23 Ch. Div. 340, 54 L. J. (Ch.) 408, where the C. A., agreeing with the Court below as to the law, held that the facts did not come up to this. *Cp. Blyth v. Fladgate* [1891] 1 Ch. 337, 60 L. J. (Ch.) 66; *Rhodes v. Moules* [1895] 1 Ch. 236, 64 L. J. (Ch.) 122, C. A. At all events, it is not within the scope of a solicitor's implied authority in partnership matters to impose liability on his partner by making himself a constructive trustee: *Mara v. Browne* [1896] 1 Ch. 199, 65 L. J. (Ch.) 225, C. A.

(g) *Tendring Hundred Waterworks Co. v. Jones* [1903] 2 Ch. 615, 73 L. J. (Ch.) 41.

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Ground of liability.—The general principle on which the firm is held to be liable in cases of this class may be expressed in more than one form. It may be put on the ground “that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority” (*h*); or the analogy to other cases where the act of one partner binds the firm may be brought out by saying that the firm is to make compensation for the wrong of the defaulting partner, because the other members “held him out to the world as a person for whom they were responsible” (*i*).

General test on principle of agency.—The rules laid down in secs. 10 and 11 of the English Act are really derived from the wider rule to the same effect which is one of the most familiar and important parts of the law of agency. The question is always whether the wrongdoer was acting as the agent of the firm and within the apparent scope of his agency. If the wrong is extraneous to the course of the partnership business, the other partners are no more liable than any other principal would be for the unauthorized act of his agent in a like case. The proposition that a principal is not liable for the wilful trespass or wrong of his agent is for most purposes sufficiently correct; but a more exact statement of the rule would be that the principal is not liable if the agent goes out of his way to commit a wrong, whether with a wrongful intention or not. On the one hand, the principal may be liable for a manifest and wilful wrong if committed by the agent in the course of his employment, and for the purpose of serving the principal's interest in the matter in hand (*j*); he is also liable for trespass committed by the agent under a mistake of fact, such that if the facts had been as the agent supposed, the act done would have been not only lawful in itself, but within the scope of his lawful authority (*k*): on the other hand, he is not liable for acts outside the agent's employment, though done in good faith and with a view to serve the principal's interest (*l*).

Special cases of misapplication of client's money by one partner.—Cases to which it has been sought with or without success, to apply the principle stated in sec. 11 of the English Act have generally arisen in the following manner. Some client of a firm of solicitors or bankers, reposing special confidence in one member of the firm, has entrusted him with money for investment: this has sometimes appeared

(*h*) Lindley, 223.

(*i*) Per James, V.C., in *Earl of Dundonald v. Masterman* (1869) L. R. 7 Eq. at p. 517, 58 L. J. (Ch.) 350.

(*j*) *Limpus v. General Omnibus Co.* (Ex. Ch. 1862) 1 H. & C. 526; *Hamlyn v. Houston & Co.* [1903] 1 K. B. 81, C. A.

(*k*) *Bayley v. Manchester, &c., Rail-*

way Co. (Ex. Ch. 1873) L. R. 8 C. P. 148, 42 L. J. (C. P.) 78.

(*l*) *Poulton v. L. & S. W. R. Co.* (1867) L. R. 2 Q. B. 534, 36 L. J. (Q. B.) 294; *Allen v. L. & S. W. R. Co.* (1870) L. R. 6 Q. B. 65, 40 L. J. (Q. B.) 55; *Bolingbroke v. Swindon Local Board* (1874) L. R. 9 C. P. 575, 43 L. J. (C. P.) 575.

in a regular course in the accounts of the firm, sometimes not. Then the money has been misapplied by the particular partner in question. When it is sought to charge the firm with making it good, it becomes important to determine whether the original transaction with the defaulting partner was in fact a partnership transaction, and if it was so, whether the duty of the firm was not determined before the default. The illustrations above given will show better than any further comments of a general kind how these questions are dealt with in practice.

In one modern case, where the facts were of a special and complicated kind, the wrong consisted in a negligent investment of trust funds on improper security made under the professional advice of one member of a firm of solicitors while the trust fund was in the hands of the firm. The result was that his partners were deemed to have notice of the improper character of the investment, and were answerable for the breach of trust as well as himself (*m*).

In another very peculiar case one solicitor used the name of another firm without authority to get money out of Court, which he proceeded to misapply. He then told a member of the firm he had used their name, but led him to suppose that it was a merely formal matter. In that belief that member of the innocent firm accepted a relatively small sum for costs of which part was returned for out of pocket expenses, and the rest went to the firm's credit, the other partner not knowing the circumstances of the payment. The firm was held liable only for this last-mentioned residue and the partner who acted only for the amount paid to him (*n*).

28. (1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

Holding out.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

This section supersedes the rather loosely worded secs. 245 and 246 of the Contract Act and follows sec. 14 of the English Act with

(*m*) *Blyth v. Fladgate* [1891] 1 Ch. 337, 60 L. J. (Ch.) 66. | (*n*) *Marsh v. Joseph* [1897] 1 Ch. 213, 66 L. J. (Ch.) 128, C. A.

S. 28 variations of language of which only one calls for mention. In sub-sec. 2 the words "any act of the firm done" looks rather wider than "any partnership debt contracted," which are those of the English Act. But it is clear from the very brief note of the Special Committee that no substantial change in the law was intended to be made. A subsequent act of the firm which does not create a debt can obviously not concern a deceased partner's estate.

"Holding Out."—This is the rule of liability commonly referred to under the name of "holding out." Representation of this kind "can only conclude the defendants with respect to those who have altered their condition on the faith of its being true" (o). In fact, this kind of liability is neither more nor less than a special application of the principle of estoppel (p).

As long ago as 1829 the rule was laid down incidentally by a great master of our law. Parke, J. said that if in the case then before the Court "it could have been proved that the defendant had held himself out to be a partner, not 'to the world'—for that is a loose expression—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement" (q).

Nearly half a century later the doctrine was more concisely stated in the course of the judgment delivered in a leading case before the Judicial Committee:—

"Where a man holds himself out as a partner, or allows others to do it . . . he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel" (r).

(o) *Quarman v. Burnett* (1840) 6 M. & W. at p. 509; 55 R. R. at p. 725, per Parke, B.

(p) Evidence Act I of 1872, sec. 115: "When one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceed-

ing between himself and such person or his representative, to deny the truth of that thing." And see *Sarat Chandra Dey v. Gopal Chandra Laha* (1892) 20 Cal. 296, L. R. 19 I. A. 203, which is the leading case on the subject.

(q) *Dickinson v. Valpy* 10, B. & C. 128, 140; 34 R. R. 348, 355.

(r) *Molhuo, March & Co. v. Court of Wards* (1872) L. R. 4 P. C. at p. 435.

"No evidence of intention or knowledge of the consequences of his acts and conduct is necessary to make the apparent parties liable" (s).

There can of course be no holding out to a person who is already in possession of the real facts, as for example by inspection of the register in the case of a firm registered under Ch. VII of the present Act.

Proof of "Holding Out."—Giving credit to a firm is in effect the same thing as giving credit to all and each of the persons believed by the creditor to be its members. It is indeed a question of fact in each case whether credit was given on the faith of the representation. But, when the representation and the creditor's knowledge of it are proved, the remaining inference that it was so is all but inevitable. As the liability depends on estoppel and not on any contract between the apparent partners it is immaterial what the agreement between them, if any, may really be.

An estoppel of this kind (or of any kind) cannot result from the mere unauthorized act of a third person, such as the exhibition by a secretary of a list of intending shareholders. "The holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used" (t). On the other hand, there need not be any direct communication between the creditor and the apparent partner, and the latter need not be mentioned by name if he is sufficiently identified by description as one of the parties interested, or the like (u).

It will not be overlooked that facts capable of being used to establish a case of liability under this section will often be relevant to show that a partnership really did exist; and, as the Evidence Act declares (v), when persons are shown to have acted as partners, the burden of proof is on those who say they were not partners. This is not estoppel, but a matter of common-sense inference.

The estates of insolvent persons who were ostensible partners may have to be administered in bankruptcy as if they had been real partners (w).

Holding Out by acquiescence.—Allowing oneself to be represented as a partner is a particular case of leading others to believe that one is a partner. There is nothing to show how much more than passive assent is signified by "knowingly permits," and the same remark applies to the

(s) *Porter v. Incell* (1905) 10 C. W. N. 313, 320.

(t) *Fox v. Clifton* (1830) 6 Bing. 776, 794; 31 R. R. 536, 545.

(u) *Martyn v. Gray* (1863) 14 C. B. N. S. 824; 135 R. R. 905.

(v) I of 1872, sec. 109. See *Bharat Spinning and Weaving Co. v. Manilal* (1935) 37 Bom. L. R. 826, 167 I. C. 4, A. I. R. 1935 P. C. 175.

(w) *Ex parte Hayman* (1878) 8 Ch. Div. 11.

S. 28 corresponding words "knowingly suffers" of the English Act, sec. 14. It can hardly be the law that, if A hears a report that Z is representing him as a partner in X. & Co., he becomes bound at his peril to notify to the world that he is not. But there is an amount of silence, in the face of known persistent representations made to persons likely to be misled, which may be good evidence of consent. All that can be said in general terms is that prudent men will rather use a little abundant caution in due season than run the risk of much more trouble at a later time. In a recent case (x), the words "knowingly suffers" in the English Act which correspond to the words "knowingly permits himself to be represented" fell to be construed. The continuing partner contrary to express direction continued to use the old note paper of the firm, and it was held that it was impossible to say that the retiring partner knowingly permitted himself to be represented as a partner. The fact that the retiring partner had been negligent or careless in not seeing that all the note-paper had been destroyed when he left did not amount to knowingly permitting himself to be represented as a partner.

In practice questions of this kind are suggested mainly by the case of a deceased or retired member's name being continued in the firm. Since our law does not in any way require the style of a firm to correspond with the names of actual partners (pp. 323, 324 above), the presence of a given name is of itself no representation that any person bearing that name is in fact a partner. It was already well settled that the continuance of a deceased partner's name will not make his estate liable for partnership debts contracted after his death. But a living retired partner may be exposed to risk in this way, that customers of the firm who have no notice of his retirement by a change of style or otherwise may go on dealing with the firm on the faith of his being a member (see Contract Act, sec. 264, and sec. 36 of the English Act). Therefore it is prudent and usual to notify customers of changes in the constitution of the firm. No creditor, however, can hold a retired partner liable whom he did not know to be a partner before the change in the firm, and who had ceased to be a partner in fact when the credit was given. Thus a "dormant partner," i.e., one not generally known to be such, "may retire from a firm without giving notice to the world" (y).

Strictly speaking, it seems that in the case of a retiring partner the representation that he is still a member of the firm is not made by others and consented to by him, but is his own; for, much oftener than not, credit given on the faith of his being a partner is so given not because the other partners say anything, but because he has said nothing. Indeed, the presence of a particular name in the firm has very little to do with the

(x) *Tower Cabinet Co. Ltd. v. Ingram* (1949) 1 All. E. R. 1033, 1036.

(y) *Heath v. Sansom* (1832) 4 B. & Ad. 172, 177; 38 R. R. 237, 242.

matter, save so far as the disappearance of a personal name may be a warning that some member of that name has died or retired. A retired member of a firm with an impersonal name might be liable to a customer who had known him to be a member (z). This, however, seems to be a matter of form rather than of substance.

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Not applicable to torts.—The doctrine of “holding out” does not apply to liability for civil wrongs, as it rests entirely on credit having been given to the person whom it is sought to make liable. One man is not answerable for another’s wrongful acts merely because that other might be supposed to be his servant. Ostensible employment, if one may use the term, is material only so far as it tends to prove real employment (a).

Estoppel distinct in kind from actual authority.—It is of some importance to observe that the liability of a former partner to creditors who have not notice of his retirement rests wholly upon the apparent continuing authority of the other partners to bind him by their acts. The principle is “that where a person has given authority to another (it is not peculiar to partnership), the authority being such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation” (b). Hence the liability, being by estoppel, is quite different from that of the actual partners, and the ex-partner is not a joint debtor with them. The creditor may be entitled to sue at his choice the members of the old or the members of the new firm. He cannot sue them all together (c).

29. (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

Rights of transferee of a partner's interest.

fere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

- (2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners to receive the share of the assets of the

(z) See *Carter v. Whalley* (1830) 1 B. & Ad. 11, 35 R. R. 199, where the firm was “the Plas Madoc Colliery Co.” Proof of “holding out” is, no doubt, less easy in such a case; and in this case

it failed.

(a) *Smith v. Bailey* [1891] 2 Q. B. 403.

(b) Lord Blackburn, *Scarf v. Jardine* (1882) 7 App. Cas. 345, 356.

(c) *Ibid.*

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firm to which the transferring partner is entitled, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

This follows sec. 31 of the English Act with verbal variations not material to the sense.

Whether a partner's interest is transferred before or after dissolution of the firm, the result is the same (*d*). This section only deals with voluntary transfer of his share by a partner and does not in terms apply to an involuntary transfer, but the omission may reasonably be supplied by the application thereto of the principles contained in this section (*e*).

As between the transferor and the transferee the purchaser must indemnify the vendor against the liabilities of the firm (*f*), and he must accept as part of the conduct of the business any agreement made in good faith between the partners for payment of salary to any of them for service rendered to the firm (*g*). But he is entitled to the vendor's actual share and not bound by any contract between the partners for valuing and dealing with it (*h*), nor by any account taken in an arbitration between them; and an arbitration clause in the articles does not affect his right to a judicial account (*i*).

A receiver appointed at the instance of a transferee is in no better position than the transferee himself, and is not entitled to ask for accounts (*j*). The transferee of the interest of a partner is not bound by a settlement of accounts of the partnership made behind his back after the date of the transfer (*k*).

30. (1) A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

Minors admitted to the benefits of partnership.

(*d*) *Public Trustee v. Elder* [1926] Ch. 266. The case was peculiar; the transfer was by operation of law consequent on war: the majority of the partners in a firm became enemies, and their interests in the firm were duly vested in the Public Trustee after the end of the war. Such a compulsory transfer puts the official in no better position than any other assignee, and accordingly the Public Trustee could not sue for an account of what was due to the ex-enemy partners without joining them as plaintiffs: *Public Trustee v. Elder* [1926] Ch. 776, C. A.

(*e*) *Ajuddhia Pershad v. Sham Sunder* (1947) Lah. 417, (1947) A. L. 13.

(*f*) *Dodson v. Downey* [1901] 2 Ch. 620.

(*g*) *Garwood's Trust* [1903] 1 Ch. 236.

(*h*) *Watts v. Driscoll* [1901] 1 Ch. 295, C. A.

(*i*) *Bonnin v. Neame* [1910] 1 Ch. 732, 79 L. J. (Ch.) 388.

(*j*) *Mistry Goa Petha v. N. H. Moos* (1931) 10 Pat. 792, 133 I. C. 40, A. I. R. 1931 Pat. 312; *Mulchand v. Shamdas* (1941) 194 I. C. 380, A. I. R. 1941 Sind 73.

(*k*) *Hugh Stevenson & Sons v. Aktiengesellschaft, etc.* [1918] A. C. 239; *Veerappa Chetty v. Muthiah Chetty* (1929) 52 Mad. 509, 121 I. C. 498, A. I. R. 1929 Mad. 627.

(2) Such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts (l) of the firm.

(3) Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act.

(4) Such minor may not sue the partners for an account or payment of his share of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in sec. 48 :

Provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the Court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partners.

(5) At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice (m) that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm :

Provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) Where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on the persons asserting that fact.

(l) Not "books" as in the Special Committee's draft: the Select Committee judged that it would be dangerous to allow any one other than a real partner

to have access to the secrets of the firm.

(m) For the definition of the public notice required here and elsewhere in the Act see sec. 72.

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(7) Where such person becomes a partner,—

- (a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and
- (b) his share in the property and profits of the firm shall be the share to which he was entitled as a minor.

(8) Where such person elects not to become a partner,—

- (a) his rights and liabilities shall continue to be those of a minor under this section up to the date on which he gives public notice,
- (b) his share shall not be liable for any acts of the firm done after the date of the notice, and
- (c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-sec. 4.

(9) Nothing in sub-secs. 7 and 8 shall affect the provisions of sec. 28.

This section corresponds to secs. 247 and 248 of the Contract Act, but makes several points explicit which were left undefined by its framers. The specification of a time limit in sub-secs. (5) and (6) appears to be new. Although there is no serious innovation, the drafting of this section gave no small trouble to both the Special Committee and the Select Committee, as may be seen in their notes.

Application of section.—The High Court of Allahabad has held that when a partnership is constituted of two persons and one of them dies, and the other admits a minor to the benefits of the business, the minor cannot enforce his rights under this section. The section applies only where a minor is admitted to the benefits of a *subsisting* partnership: see sub-sec. 1 (n). This section was not applied in the case of a person who had become a major before the Act came into force (o).

Admitted minor's benefits.—In India a minor cannot make any contract at all (see sec. 11 of the Contract Act as construed by the Judicial Committee) (p) and therefore cannot really be a

(n) *Lachmi Narain v. Beni Ram* (1931) 53 All. 479, 130 I. C. 704, A.I.R. 1931 All. 327.

(o) *Mohamad Ali v. Karji Kondho*

(1945) A. P. 286, 220 I. C. 217.

(p) *Mohori Bibee v. Dhurmodas Ghose* (1903) L. R. 30 I. A. 114; 30 Cal. 539.

partner (g). Adult members of a firm cannot be prevented from offering the benefits of partnership to a minor, but they cannot entitle him to sue them for an account or otherwise as on a contract. Still less can a minor's guardian enter into a partnership on his behalf and bind his share (r). The material point, however, is that his share in the firm's property is subject to the firm's debts (s).

It is perhaps not a very apt use of language, but it seems inveterate, to speak of a partner's share as being liable when it is meant that his claims on the firm's funds are subject to prior claims, and that in certain events there may be no share at all. A partner's share, like that of a shareholder in a company, who is in fact a special kind of partner, is not a piece of tangible property or a specific fund. It is a mere personal right to claim a certain proportion of the divisible income, and ultimately to reclaim a certain proportion of capital, at the proper times, if and whenever it is found that there is any profit to divide and any surplus assets to distribute (t). In fact the word "share" in sec. 247 of the Contract Act (from which sub-secs. (2) and (3) of the present section cannot for this purpose be distinguished) has been declared by the Judicial Committee to be no more than a right to participate in the property of the firm after its obligations have been satisfied (u). The legal title or interest in partnership property will, as a rule, be found to be in the partners jointly; but that is quite another matter.

Hindu minor's ancestral trade.—There is no difference in principle between the nature of the liability of an infant admitted by agreement into a partnership business and that of one on whose behalf an ancestral trade is carried on by his guardian. A minor Hindu, therefore, on whose behalf such a trade is carried on, is not personally liable for the debts incurred in such trade, but his share therein is alone liable (v). Neither can the *karta* of a joint family impose on a minor member of it the risk and liability of a new business started by himself and the other adult

(g) *Sanyasi Charan Mandal v. Krish-nadhan Banerji* (1922) L. R. 49 I. A. 108; 49 Cal. 560; 67 I. C. 124.

(r) *A. Khorasany v. C. Acha* (1928) 6 Ran. 198; 110 I. C. 349; A. I. R. 1928 Rang. 160 (Moslem widow); *Inspector Singh v. Kharak Singh* (1928) 50 All. 776; 26 All. L. J. 577; 112 I. C. 881; A. I. R. 1928 All. 403 (Hindu father); *Cp. Rattan Chand v. Ram Kishan Murarji* (1928) 26 All. L. J. 777; 114 I. C. 743; A. I. R. 1928 All. 447.

(s) *Cp. Jafferli Bhaloo Lakha v. Standard Bank of S. Africa*, 107 I. C. 453; A. I. R. 1928 P. C. 135 (appeal from E. Africa; identical enactment in Zanzibar).

(t) See *In the goods of Sir A. A. D. Sassoon* (1897) 21 Bom. 673, 678-679.

(u) *Sanyasi Charan Mandal v. Krish-nadhan Banerji*, (1922) L. R. 49 I. A. 108; 49 Cal. 560; 67 I. C. 124.

(v) *Joykisto v. Nityanund* (1878) 3 Cal. 738; *Rampartab v. Foolibai* (1896) 20 Bom. 767, 777, 778; *Grey v. Lamond Walker* (1913) 40 Cal. 523; *Sanyasi Charan Mandal v. Asutosh Ghose* (1915) 42 Cal. 225; *Khetra Mohan v. Nishi Kumar* (1917) 22 C. W. N. 488; 45 I. C. 667; *Sanka Krishna Murthi v. The Bank of Burma* (1912) 35 Mad. 692; 11 I. C. 79; *Narain Das v. Ralli Brothers* (1915) Punj. Rec. No. 61, p. 270; 31 I. C. 45.

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members (w). And a member of the family on attaining majority does not necessarily become personally liable for debts contracted in the joint family business during his minority (x).

English Law.—In England an infant may be a partner but cannot be sued for debts of the firm during his minority; and he may either before or within a reasonable time after attaining full age affirm or avoid his partnership and any particular incidental obligations, this being the general rule as to agreements made by infants (with exceptions which do not here concern us). But as to ascertainment of divisible profits and the settlement of accounts generally he is in no better position than any other partner. The results may not be widely different from those which practically occur in India; but the initial principles being different, the English cases are not of authority in Indian Courts. Advanced students who desire to master the principles which govern the treatment of an infant partner or reputed partner in a firm under English law will find a profitable exposition in the judgments delivered by a very strong Court more than a century ago (y); not the less profitable because the particular question before that Court could not be raised under the modern law of India.

(w) See note (u) p. 367.

(x) *Official Assignee of Madras v. Palaniappa Chetty* (1918) 41 Mad. 824;

49 I. C. 220.

(y) *Goode v. Harrison* (1821) 5 B. & Ald. 147; 24 R. R. 307.

CHAPTER V.

INCOMING AND OUTGOING PARTNERS.

Chapter V.—This Chapter of the Act, as the Special Committee pointed out, is novel in form. It collects in one body the rules as to the coming in of new partners and going out of existing ones, in so far as the change does not put an end to the firm but leaves the relations between the continuing partners untouched. Men of business will welcome this rearrangement as convenient; it seems, indeed, to be one of those improvements whose convenience is so obvious when they have been made as to excite wonder why nobody thought of them before.

31. (1) Subject to contract between the partners and **S. 31**
 Introduction of a to the provisions of sec. 30, no person shall
 partner. be introduced as a partner into a firm
 without the consent of all the existing partners.

(2) Subject to the provisions of sec. 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

Sub-sec. (1).—Sub-sec. (1) answers to the Contract Act, sec. 253, sub-sec. 6, and sec. 24, sub-sec. 7, of the English Act.

This does not mean that a partner's transfer of his interest in the property or profits of the firm is wholly ineffectual. We have seen under sec. 29 what rights the transferee acquires by such a transaction. But any partner or partners who object to the transfer can sue for a dissolution (2).

Introduction of partners by agreement.—Express power for a senior or principal member of a firm to introduce one or more new partners, named or not named, under agreed conditions, is in fact constantly given by partnership articles. A person duly nominated under such a power acquires rights in the partnership property which the Court will enforce by way of appropriate specific relief (a), though it cannot enforce an agreement to enter into partnership, because the foundation of partnership is mutual confidence, which the Court cannot supply where it does not exist (b).

(a) The firm is not automatically dissolved; this is now implied in sec. 29; and the law was already so: see *Dhanaji Jhelaji v. Gulabchand Pana* (1924) 87 I. C. 812, A. I. R. 1925 Bom. 347, 27 Bom. L. R. 409; *Juggut Chunder*

v. Rada Nath (1884) 10 Cal. 669.

(a) *Byrne v. Reid* [1902] 2 Ch. 735, C. A.

(b) See *Satyanarayanamurthi v. Gopalan* (1939) 2 M. L. J. 279, 186 I. C. 57 A. I. R. 1939 Mad. 891.

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Nomination of successor.—In the case of a power to nominate a successor on death it is necessary for its execution that there should be “a specific direction in that behalf either in express terms, or, at any rate, by a specific disposal of the deceased partner’s interest in the firm.” The will of a deceased partner, making a general bequest of his property, does not operate as an exercise of such a power (c).

Though a member of a joint Hindu family cannot sue for an account of the profits of a partnership which is alleged to be joint family property and for an award to him of his share therein (d), he is entitled to an injunction if he is excluded from the management of the family business (e). But the relief in such a case is granted not on the specific rules as to the law of partnership, but upon the general principle that one member of an undivided Hindu family cannot be ousted by others from any item of family property (f).

It should be superfluous to mention that an agreement among the members of a firm whereby one of them acquires the whole interest in the business is not the introduction of a new partner. Such an agreement may of course raise various questions of fact and construction according to the circumstances (g). Incidentally it has been decided (if a decision was necessary) that there is no general rule of law forbidding A, being a partner with B and C, to agree with B for the purchase of his interest without consulting C (h).

Sub-sec. 2 replaces the second branch of sec. 249 of the Contract Act, which is reproduced in sec. 17, sub-sec. 1, of the English Act. The words “liable for any act of the firm” are wider than “liable to creditors of the firm,” which is the language of the Contract Act, but make no difference in the law, for no one ever supposed that an incoming partner became liable, merely by his entry into the firm, for antecedent liabilities independent of contract. “The clause makes no provision for the liability of the new partner for future debts of the firm, as this is covered by the general provision of clause 25” (note of Special Committee).

The new firm, however—including the new partner who has joined it—may agree to assume liability for existing debts of the old firm, and creditors may agree to accept the new firm as their debtor and discharge the old one. The creditor’s consent is necessary in every case to make the transaction operative.

(c) *Bachubai v. Shamji* (1885) 9 Bom. 536, 554.

(d) See Pollock and Mulla, notes on sec. 239 of the Contract Act under the head “Joint Hindu Family Firm.”

(e) *Ganpat v. Annaji* (1898) 23 Bom. 144.

(f) See *Anant v. Gopal* (1894) 19 Bom.

269; *Ramchandra v. Damodhar* (1895) 20 Bom. 467.

(g) E.g., *Cassels v. Stewart* (1881) 6 App. Cas. 64, seemingly reported because it was an appeal from Scotland and there was a good deal of money in it; *Heath v. Sansom* (1832) 4 B. & Ad. 172, 28 R. R. 237.

(h) *Ibid.*

Test of liability of new firm.—Accordingly, to determine whether an incoming partner has become liable to an existing creditor of the firm, two questions have to be considered :—

First : Whether the new firm has assumed the liability to pay the debt.

Second : Whether the creditor has agreed to accept the new firm as his debtors, and to discharge the old partnership from its liability (i).

Novation.—*Novation* is the technical name for the contract of substituted liability, which is, of course, not confined to cases of partnership. As between the incoming partner and the creditor, the consideration for the undertaking of the liability is the change of the creditor's existing rights (j).

Mere agreement between partners cannot operate as Novation.—An agreement between the old partners and the incoming partner that he shall be liable for existing debts will not of itself give the creditors of the firm any right against him ; for it is the rule of modern English law (though it was formerly otherwise in England, and now is, to some extent, in several American States) that not even the express intention of the parties to a contract can enable a third person for whose benefit it was made to enforce it. The rule of English law is also followed in India (k). An incoming partner is liable, however, for new debts arising out of a continuing contract made by the firm before he joined it ; as where the old firm had given a continuing order for the supply of a particular kind of goods (l).

In 1901 the House of Lords decided, on appeal from Scotland, a curious case in which two of three partners, who as trustees were creditors and as members of the firm debtors for money left in the business, purported to effect a novation and release the third partner ; this was nothing but a fraudulent breach of trust, and the third partner remained liable. "A power to lend to a firm consisting of certain individuals does not authorize a loan to a firm differently constituted whether including more individuals or less" (m).

There is in law nothing to prevent a firm from stipulating with any creditor from the beginning that he shall look only to the members of

(i) *Rolfe v. Flower* (1865) L. R. 1 P. C. at p. 38, 3 Moo. P. C. N. S. 380, 16 E. R. at p. 145, 146 R. R. 104.

(j) See *P. D. Sarma v. Phanindra Nath Mukherjee* (1931) 35 Cal. W. N. 593.

(k) *Russa Engineering Works v. Kanara Transport Co.* (1926) 41 Mad. 930, 98 I. C. 257, A. I. R. 1926 Mad. 1138 ;

Madho Prasad v. Gouri Dutt (1939) 183 I. C. 179, A. I. R. 1939 Pat. 323. See P. & M. Contract Act pp. 19-21.

(l) Lindley, 273.

(m) *Smith v. Patrick* [1901] A. C. 282 ; per Lord Davey at p. 294. "There was clearly no consideration for the discharge" ; Lindley, 314, note (p).

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the firm for the time being : the term *novation*, however, is not properly applicable to such a case (n).

As to novation in general, see further sec. 62 of the Contract Act and the commentary thereon in ed. Pollock and Mulla.

32. (1) A partner may retire---

Retirement of a partner. (a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice (o) is given of the retirement :

Provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-sec. (3) may be given by the retired partner or by any partner of the reconstituted firm.

Retirement of partner.—A partner is said to retire when he ceases to be a member of the firm without prejudice to the subsisting relations between the other members, or between the firm and third parties. The term “ does not cover the case where a partner withdraws from a firm by dissolving it, which should properly be referred [to] as a dissolution and not as a retirement ” (note of Special Committee).

(n) This is involved in *Hort's Case* and *Grain's Case* (1875) 1 Ch. Div. 307; see per James, L. J. at p. 322, and op. Lindley 320, note (m).
(o) See s. 72 below.

The law as now settled with regard to retiring partners may be viewed as a compromise between the strict doctrine of English common law, which refuses to see anything in the firm but a collective name for individuals carrying on business in partnership, and the mercantile usage which recognizes the firm as a distinct person or quasi-corporation. This point of view may help to explain why the rules have to be laid down separately and in detail.

Sub-sec. 1 is new in form though not in substance. Sub-secs. 2 and 3 correspond to sec. 17, sub-secs. 3 and 2, of the English Act; the order of those sub-sections is transposed and our sub-sec. (3) gives in a different wording the effect of sec. 36, sub-sec. 1, of the English Act.

The Select Committee thought they were departing to some small extent from English authority in the terms of this section; the variance is so little more than verbal that it is not worth discussing. In any case the present Act speaks for itself, and in this section cannot be misunderstood.

The express agreement contemplated in sub-sec. 1 (b) is of a kind that frequently occurs in partnership articles. It is of course open to intending partners, when they are settling the constitution of the firm, to make such provision as they please both for the retirement of members and for the admission of new members. A partner retiring in accordance with the terms of the articles, and observing those terms, is exercising a right acquired by him under the original contract of partnership, and has no need to seek any farther consent.

A partner in a partnership at will can not retire except by giving a notice in writing under sec. 32 (1) (c) (p).

Partnership at will : tacit dissolution.—An intention to dissolve a firm may be inferred from circumstances showing that a partner has in fact abandoned his interest in the business. No positive rule can be formulated to define what evidence will be sufficient. It is a matter of inference from the facts in each case whether a partner's interest has or has not been abandoned either by overt acts or passively by laches (q). Unless there is a novatio a partner who retires does not thereby cease to be liable for the firm's liabilities incurred before his retirement. A partner of a firm that has infringed a trade mark is liable even though he had retired before the suit for damages was filed (r). He remains liable until the partnership affairs are wound up or such liabilities are discharged

(p) *Banwarilal v. Roop Kishore* (1945) All. 520, (1945) A.A. 332.

(q) *Moung Tha Huyin v. Mah Thein Myah* (1900) 28 Cal. 53, L. R. 27 L. A. 189; *Sudarsanam v.*

Narasimhulu (1901) 25 Mad. 149, 164.

(r) *Thomas Bear & Sons v. Rulia Ram* (1934) 148 I. C. 763, A. I. R. 1934 Lah. 625.

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and this is so although he may be only a sleeping partner (s). The Act makes no provision for the separation of the share of a retiring partner, and the intention may be that this is a matter of agreement between the partners (t).

33. (1) A partner may not be expelled from a firm by Expulsion of a any majority of the partners, save in the partner. exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of sub-secs. (2), (3) and (4) of sec. 32 shall apply to an expelled partner as if he were a retired partner.

Expulsion of partner: sub-sec. (1).—The operative part of this section is equivalent to Contract Act, sec. 253, sub-sec. (9), and sec. 25 of the English Act. Where the terms of partnership do confer power to expel a partner, its exercise will not be in good faith unless the decision is made with an honest view to the interests of the firm, and with notice to the partner affected and an opportunity of being heard (u). Even if an express provision in the articles dispensed the majority from giving reasons for their decision, it will not dispense them from the duty of acting in good faith (v).

An irregular expulsion is wholly without effect; it is like a sentence given without jurisdiction. The partner whom the majority purport to expel does not cease to be a partner, and his proper remedy is to claim reinstatement in his rights (w), not to sue for damages which in point of law he cannot have sustained (x).

Partnership articles may confer power to determine the partnership for certain causes, such as being dissatisfied with the conduct of the business. Such powers are not like expulsion clauses; they are options to be exercised at the discretion of the parties to whom they are given (y). If power is given to determine the partnership by notice for breach of the articles, with a provision for arbitration if the breach is denied, a notice to dissolve, being only preliminary to arbitration if required, need not specify the breaches complained of (z).

(s) *Court v. Berlin* (1897) 2 Q. B. 396 C. A.

(t) *Ajudhia Pershad v. Sham Sunder* (1947) Lah. 417, (1947) A. L. 13.

(u) Reported authorities are no longer necessary, but may be instructive as exposition. See *Const v. Harris* (1823) T. & R. 496, 525, 24 R. R. 108, 132; *Barnes v. Youngs* [1898] 1 Ch. 414.

(v) *Blisset v. Daniel* (1853) 10 Ha. 493, 90 R. R. 454.

(w) *Ibid.*

(x) *Wood v. Wood* (1874) L. R. 9 Ex. 190. It might be a distinct actionable injury to publish an assertion that he was expelled or that he had ceased to be a member of the firm.

(y) *Russell v. Russell* (1880) 14 Ch. D. 481.

(z) *Green v. Howell* [1910] 1 Ch. 495, C. A., correcting a dictum in *Barnes v. Youngs*, note (u) above.

Particular kinds of misconduct may be specified as causes either of expulsion or of optional dissolution. If necessary the Court must decide according to the ordinary rules of construction whether the facts proved or admitted come within the description (a).

Sub-sec. (2).—Sub-sec. (2) appears to be new as an express declaration that the incidental consequences of leaving a firm by expulsion are the same as those of uncontentious retirement. Even if it is a piece of abundant caution it is properly added.

34. (1) Where a partner in a firm is adjudicated an insolvent of a partner. he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved.

(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

This supersedes the less explicit provision of the Contract Act, sec. 254, sub-sec. (2). Cp. sec. 33, sub-sec. (1), of the English Act.

Date of adjudication.—The effect of the provision as to date, which is new, must be carefully noted with regard to the general law of insolvency. Within the extent of the Presidency-towns Insolvency Act, 1909, insolvency relates back under sec. 51 to the earliest act of insolvency within three months before the petition. In cases governed by the Provincial Insolvency Act of 1921 it relates back to the date of the petition. Under the present section an insolvent partner ceases to be a partner on neither of these dates but on the date of the order of adjudication. And an adjudication order is made on the date when it is pronounced and not on the date when it is signed and sealed (b).

Before this act the partnership was not automatically dissolved, but there was only ground for a dissolution at the suit of the other partners. This is a useful simplification (c). Apparently the insolvent partner's

(a) *Clifford v. Timms* [1908] A. C. 12 ("professional misconduct" in a firm of dentists); *Carmichael v. Evans* [1904] 1 Ch. 486 ("flagrant breach of duty" includes conviction for fraud).

(b) *Blount v. Whitley* (1899) 79 L. T. 635, 6 Man. 48; *In the matter of Bodry* (1870) 5 Ben. L. R. 309.

(c) See *Nichalsingh Mahtarsingh v. Vishenji Goverdandhas*, 106 I. C. 54, A. I. R. 1928 Sind 71.

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authority as a member of the firm continues down to the date of adjudication.

Sub-sec. (2) is equivalent in part to sec. 36, sub-sec. (3), of the English Act. The following illustration is taken from Sir F. Pollock's Digest of the Law of Partnership.

A is a partner with other persons in a bank. *A* dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. *A*'s estate is liable to customers of the bank for balances due to them at *A*'s death, so far as they still remain due and for other partnership liabilities incurred before *A*'s death (*d*); but not for any debts contracted or liabilities incurred by the firm towards customers after *A*'s death (*e*).

In the case of liabilities of the firm which have arisen after *A*'s death, it makes no difference that at the time when the partnership liability arose the customer believed *A* to be still living and a member of the firm (*f*).

35. Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased partner is not liable for any act of the firm done after his death.

As to the case of the firm being dissolved, see the general provisions for the effect of dissolution in sec. 47 below. This is one of the cases included in sec. 36, sub-sec. 3, of the English Act.

A is a partner with other persons in a bank. *A* dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. *A*'s estate is liable to customers of the bank for balances due to them at *A*'s death, so far as they still remain due, and for other partnership liabilities incurred before *A*'s death (*g*); but not for any debts contracted or liabilities incurred by the firm towards customers after *A*'s death (*h*). [From Pollock's Digest, p. 110.]

(*d*) *Devaynes v. Noble* (1816) 1 Mer. 529, 15 R. R. 151; *Sleech's Case* (1816) 1 Mer. at p. 539, 15 R. R. 155; *Clayton's Case* (1816) at p. 572, 15 R. R. 161.

(*e*) *Brice's Case* (1816) 1 Mer. 622, 15 R. R. 171.

(*f*) *Houlton's Case* (1816) 1 Mer. 616, 15 R. R. 169. The judgment itself in this case is not reported; but it appears by the marginal note and the context that it followed *Brice's Case*. The

authority of *Houlton's Case* is not affected by anything in the English Act, *Friend v. Young* [1897] 2 Ch. 421, 428, 66 L. J. (Ch.) 737.

(*g*) *Devaynes v. Noble* (1816) 1 Mer. 529, 35 E. R. 767, 15 R. R. 151; *Sleech's Case* (1816) 1 Mer. at p. 539, 35 E. R. 771, 15 R. R. 155; *Clayton's Case* (1816) 1 Mer. at 572, 35 E. R. 781, 15 R. R. 161.

(*h*) *Brice's Case* (1816) 1 Mer. 622, 35 E. R. 797, 15 R. R. 171.

36. (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not—

Rights of outgoing partner to carry on competing business.

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or
- (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.

(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits; and, notwithstanding anything contained in sec. 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Agreements in restraint of trade.

The substance of this section is founded on the English authorities on the disposal of goodwill. The rules, although a large proportion of the decisions which established them were in fact on partnership affairs, are not confined to cases where the business has been carried on in partnership. For this reason, presumably, they were not dealt with either in the Contract Act or in the English Act. The Special Committee described the rules here enacted as "a statement of the chief judicial rulings on the subject of the sale of goodwill, narrowed to the particular application where a partner sells, or is deemed to sell, his share of the goodwill to his fellow partners" (i).

It may be useful to repeat here the general statement of the English rules given in Sir F. Pollock's Digest of the Law of Partnership, pp. 122-124.

Rights of partners as to goodwill.—On the dissolution of a partnership every partner has a right, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners (j).

Rights and duties of vendor and purchaser of goodwill.—Where the goodwill of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are

(i) In the following sentence of the Note 57 is a misprint for 37.

(j) Lindley, 539-541. In other words, the goodwill, and therefore also

the firm-name, is part of the partnership assets: *Levy v. Walker* (1879) 10 Ch. Div. 436, 446.

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determined by the following rules in the absence of any special agreement excluding or varying their effect :—

- (a) The purchaser alone may represent himself as continuing or succeeding to the business of the vendor (*k*).
- (b) The vendor may nevertheless carry on a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the same business (*k*).
- (c) The vendor may publicly advertise his business, but may not canvass the customers of the former firm (*l*), even if they have of their own choice continued to deal with him (*m*). This rule extends to a vendor's executor carrying out a contract for the sale of goodwill (*n*). It does not matter that the executor has no discretion as to selling.
- (d) The sale carries the exclusive right to use the name of the former firm (*o*), subject to this qualification, that the purchaser may use the vendor's name only "so long as so far as he does not by so doing expose him to any liability" (*p*). It also carries the benefit of any covenant by a partner not to carry on a competing business for a fixed term (*q*). The purchaser has the right to trade as the vendor's successor, but not to hold out the vendor as still in the business and personally answerable (*r*). A purchaser of "assets" without any restrictive terms, or a partner retaining the "assets" on dissolution, is entitled to the goodwill, with its incidental rights (*s*). The effect of special terms, if any, must be considered in each case as they occur (*t*). On a dissolution without any special provision naming

(*k*) *Churton v. Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56. But the vendor's wife, having separate estate, cannot be restrained from carrying on a competing business on her own account and in her own name: *Smith v. Hancock* [1894] 3 Ch. 377, C. A. (diss. Kay, L. J.).

(*l*) *Trego v. Hunt* [1896] A. C. 7, 65 L. J. (Ch.) 1, where the House of Lords restored the authority of *Labouchere v. Dawson* (1872) L. R. 13 Eq. 322, against the Court of Appeal. A partner who has been expelled under a provision in the articles is not restrained from carrying on the same business on his own account, or soliciting customers of the old firm: *Dawson v. Beeson* (1882) 22 Ch. Div. 504. Similarly, a bankrupt (*Walker v. Mottram* [1881] 19 Ch. D. 356) and a debtor who has assigned his business and goodwill for

the benefit of creditors (*Farey v. Cooper* [1927] 2 K. B. 384) are not vendors for the purpose of the rule.

(*m*) *Curl Bros. v. Webster* [1904] 1 Ch. 685.

(*n*) *Boorne v. Wicker* [1927] 1 Ch. 667.

(*o*) *Levy v. Walker* (1879) 10 Ch. Div. 436; *Re David and Matthews* [1899] 1 Ch. 378.

(*p*) *Thynne v. Shove* (1890) 45 Ch. Div. 577, 582.

(*q*) *Townsend v. Jarman* [1900] 2 Ch. 698.

(*r*) 45 Ch. Div. at p. 580; *Churton v. Douglas* (1859) Johns. at p. 190, 70 E. R. at p. 391.

(*s*) *Jennings v. Jennings* [1898] 1 Ch. 378.

(*t*) See *Pearson v. Pearson* (1884) 27 Ch. Div. 145, not overruled on this point.

or including goodwill, or restricting the use of the firm name, either partner may use the old name, provided he does not thereby expose a former partner to any substantial risk. Whether there is such risk in the particular case is a question of fact depending on the nature of the business and other circumstances (*u*).

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Illustrations.

1. *A, B and C* have carried on business in partnership under the firm of *A and Co.* *A* retires from the firm on the terms of the other partners purchasing from him his interest in the business and goodwill, and *D* is taken in as a new partner. *B, C and D* continue the business under the firm of "*B, C and D, late A and Co.*" *A* may set up a similar business of his own next door to them, but not under the firm of *A and Co.* (*v*).

2. One of several persons carrying on business in partnership having died, the affairs of the partnership are wound up by the Court, and a sale of the partnership assets, including the goodwill, is directed. The goodwill must not be valued on the supposition that any surviving partner, if he does not himself become the purchaser, can be restrained from setting up the same kind of business on his own account (*w*), for "no Court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon the same principles as if a Court could prevent their so engaging" (*x*).

With regard to sec. 27 of the Contract Act, the second and third exceptions to that unfortunate following of the draft Civil Code of New York (see the comment in ed. Pollock and Mulla) are superseded by the section now before us, and accordingly repealed by sec. 73 below.

As to agreements in restraint of competition after dissolution of the firm, see secs. 54 and 55 below.

37. Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate,

Right of outgoing partner in certain cases to share subsequent profits.

(*u*) *Burchell v. Wilde* [1900] 1 Ch. 551, C. A.; *Townsend v. Jarman* [1900] 2 Ch. 698.

(*v*) *Churton v. Douglas* (1859) Johns. 174, 70 E. R. 385.

(*w*) *Hall v. Barrows* (1863) 4 D. J. & S. at p. 159, 46 E. R. at p. 877, 146 R. R. 254.

(*x*) Lord Eldon's decree in *Cook v. Collingridge* (1825), given in 27 Beav.

456, 459, 54 E. R. 180, 23 R. R. 767. The declarations and directions there inserted contain an exposition of the nature and legal incidents of goodwill which is still of high authority. See now on the position of a purchaser of goodwill, and the principles of valuation, per Romer, J., in *Re David and Matthews* [1899] 1 Ch. 378.

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then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm :

Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

Right of outgoing partner to share subsequent profits.—This section is all but identical with sec. 42 of the English Act ; the variations consist in the Indian rate of interest being named instead of the English five per cent., and the omission of three unnecessary words (reading “such share . . . as may be attributable,” not “as the Court may find to be”). The law as stated in this section prevailed in India even before this enactment (y), and sec. 42 of the English Partnership Act, 1890, only gave effect to what was the law then existing in England. This section is only a particular application of the general equitable principle that a person in a fiduciary position must account to the beneficiary for profits made by him. The general principle has been enacted in secs. 88, 90 and 95 of the Indian Trusts Act, 1882. Illustration (f) to sec. 88 to that Act is as follows :—

“A and B are partners. A dies. B, instead of winding-up the affairs of the partnership, retains all the assets in the business. B must account to A’s legal representative for the profits arising from A’s share of the capital.”

The principle of this section is applicable even when only part of the retiring partner’s assets is utilized by the surviving partners (z). In

(y) *Bhugwandas v. Rivett-Carnac* (1898) L. R. 26 I. A. 32, 23 Bom. 544 ; *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji* (1915) L. R. 42 I. A. 91, 42 Cal. 914, 28 I. C. 710 ; *Ramakrishna Ayyar v. Muthusami Ayyar* (1928) 52 Mad. 672, 121 I. C. 609, A. I. R. 1929 Mad. 456 ; *Lachmi Narain v. Beni Ram* (1931)

53 All. 479, 130 I. C. 704, A. I. R. 1931 All. 327.

(z) *Bhugwandas v. Rivett-Carnac* (1898) L. R. 26 I. A. 32, 23 Bom. 544, 550 ; *Ramakrishna Ayyar v. Muthusami Ayyar* (1928) 52 Mad. 672, 121 I. C. 609, A. I. R. 1929 Mad. 456.

taking an account of the profits, the surviving partners will be entitled to be credited with a sum sufficient to recompense them for the skill and labour employed in the conduct of the business after dissolution; and it will be open to them to prove that any portion of the profits was obtained, not by reason of the use of the partnership assets but in some other manner (a).

Not only the substance but the terms of the English Act being here enacted for India, the illustrations and comments on the English text given in Pollock's Digest are now reproduced. It may well be that some of the examples do not exactly fit Indian habits or circumstances, but even these may be useful by way of analogy if discreetly used.

Illustrations to Para. 1.

1. *A, B and C* are partners in a manufacture of machinery. *A* is entitled to three-eighths of the partnership property and profits. *A* becomes bankrupt, and *B* and *C* continue the business without paying out *A*'s share of the partnership assets or settling accounts with his estate. *A*'s estate is entitled to three-eighths of the profits made in the business from the date of his bankruptcy until the final liquidation of the partnership affairs (b).

2. *A* and *B* are partners. The partnership is dissolved by consent, and it is agreed that the assets and business of the firm shall be sold by auction. *A* nevertheless continues to carry on the business on the partnership premises, and with the partnership property and capital, and upon his own account. He must account to *B* for the profits thus made (c).

3. *A* and *B* trade in partnership as merchants. *A* dies, and *B* continues the business with *A*'s capital. *B* must account to *A*'s estate for the profits made since *A*'s death, but the Court will make in *B*'s favour such allowance as it thinks just for his skill and trouble in managing the business (d).

4. *A, B* and *C* are merchants trading in partnership under articles which provide that upon the death of any partner the goodwill of the business shall belong exclusively to the survivors. *A* dies, and *B* and *C* pay or account for interest to his legatees, upon the estimated value of his share at the time of his death, but do not pay out the capital amount thereof. The firm afterwards make large profits, but the nature of the

(a) *Ramakrishna Ayyar v. Muthusami Ayyar* (1928) 52 Mad. 672, 121 I. C. 609, A. I. R. 1929 Mad. 456. For a form of order see *Manley v. Sartori* [1927] 1 Ch. 157, at pp. 166-167.

(b) *Crawshaw v. Collins* (1826) 2 Russ. 325, 342-345, 347, 38 E. R. 358,

26 R. R. 83.

(c) *Turner v. Major* (1862) 3 Giff. 442, 66 E. R. 483, 133 R. R. 162.

(d) *Brown v. De Tastet* (1821) Jac. 284, 299, 37 E. R. 858, 23 R. R. 59; cp. *Yates v. Finn* (1880) 13 Ch. D. 839, 49 L. J. (Ch.) 188.

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business and the circumstances at the time of *A*'s death were such that at that time any attempt to realize the assets of the firm or the amount of *A*'s share would have been highly imprudent, and would have endangered the solvency of the firm, so that *A*'s share in the partnership assets if then ascertained by a forced winding-up would have been of no value whatever. Under these circumstances the profits made in the business after *A*'s death are chiefly attributable, not to *A*'s share of capital, but to the goodwill and reputation of the business and the skill of the surviving partners and *A*'s legatees have no claim to participate in such profits to any greater extent than the amounts already paid or accounted for to them in respect of interest on the estimated value of *A*'s share (e).

5. The facts are as in the last illustration, except that the articles do not provide that the goodwill shall belong to surviving partners. The deceased partner's estate is entitled to share in the profits made since his death and attributable to goodwill in a proportion corresponding to his interest in the value of the goodwill itself as a partnership asset. The evidence of experts in the particular business will be admitted, if necessary, to ascertain how much of the profits was attributable to goodwill (f).

6. *A* and *B* are partners, sharing profits equally, in a business in which *A* finds the capital and *B* the skill. *B* dies before there has been time for his skill in the business to create a goodwill of appreciable value for the firm. *A* continues the business of the firm with the assistance of other skilled persons. *B*'s estate is [probably] not entitled to any share of the profits made after *A*'s death.

7. The other facts being as in the last illustration, *B* dies after his skill in the business has created a connection and goodwill for the firm. *B*'s estate is [probably] entitled to a share of the profits made after *B*'s death (g).

Illustrations to Para. 2.

1. *A*, *B* and *C* are partners, under articles which provide that on the death of *A*, *B* and *C*, or the survivor of them, may continue the business in partnership with *A*'s representatives or nominees, taking at the same time an increased share in the profits; and that, in that case, *B* and *C* or the survivor of them shall enter into new articles of partnership, pay out in a specified manner the value of the part of *A*'s interest taken over, and give certain securities to *A*'s representatives. *B* dies, then *A* dies. *C* carries on the business without pursuing the provisions

(e) *Wedderburn v. Wedderburn* (1855-6) 22 Beav. 84, 123, 124, 52 E. R. 1039, 111 R. R. 267, 290, 291.

(f) See 22 Beav. at pp. 104, 112, 122, 52 E. R. 1047, 111 R. R. 278, 283, 290

(1855-6).

(g) These last two cases are given by Wigram, V.C., in his judgment in *Willatt v. Blanford* (1841) 1 Ha. at p. 271, 66 E. R. at p. 1034, 58 R. R. 74, 75.

of the articles as to entering into new articles, or paying out the value of the part of *A*'s interest which he is entitled to acquire, or giving security. *C* must account to *A*'s estate for subsequent profits (*h*).

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2. *A*, *B* and *C* are partners under articles which provide that in case of the death of any partner the value of his share shall be ascertained as therein provided, with an allowance in lieu of profits at the rate of 5 per cent. per annum upon his share of the capital, and that the moneys found to be due to his executors shall be taken in full for the purchase of his share, and shall be paid out in a certain manner by instalments extending over two years. *A* dies. *B* and *C* ascertain the amount of his share, and pay interest thereon to his representatives, but, acting in good faith for the benefit of the persons interested, they do not pay out the capital within the two years. This delay in making the complete payment out is not a material non-compliance with the terms of the option of purchase, and *B* and *C* cannot be called upon to account to *A*'s estate for profits subsequent to *A*'s death (*i*).

3. Where, as in such a case as this sub-section contemplates, the partnership contract provides for indemnifying a deceased partner's estate against liabilities of the firm, the executors are not entitled to call on the firm to pay off liabilities (e.g., an overdraft) for which there has been no demand (*j*). If there is no agreement as stated in the proviso to the section and a continuing partner takes the share of the deceased partner at an undervalue, the representative of the deceased partner cannot compel him to retain it at a proper valuation. His proper remedy is to have the account settled on principles enacted in this section (*k*).

Claims against surviving or continuing partners as executors or trustees.—The reader who is already acquainted with the cases now cited by way of illustration will perceive that several of them have been designedly simplified in statement. It often happens that a partner in a firm disposing of his interest in it by will, and not desiring the affairs of the firm to be exposed to the interference of strangers, makes his fellow partners or some of them his executors or trustees, or includes one or more of them among the persons appointed to those offices. If, having done this, he dies while the partnership is subsisting, there may arise at the same time, and either wholly or in part in the same persons, two kinds of duties in respect of the testator's interest which are in many ways alike in their nature and incidents, but must be nevertheless kept distinct: There is the duty of the surviving partners *as partners* towards the deceased

(*h*) *Willett v. Blanford* (1841) 1 Ha. 253, 264, 66 E. R. 1027 58 R. R. 61, 69.

(*i*) *Vyse v. Foster* (1874) L. R. 7 H. L. 318, 44 L. J. (Ch. 37).

(*j*) *Bradford v. Gammon* [1925] 1 Ch. 132, 94 L. J. (Ch.) 193.

(*k*) *Sivagnanathammal v. Nallaperumal* (1934) 67 M. L. J. 880, 155 I. C. 783 A. I. R. 1935 Mad. 165.

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partner's estate ; and of this we have just spoken. There is also the duty of the same persons, or some of them, as *executors or trustees* towards the persons beneficially interested in that estate ; and this is determined by principles which are really independent of the law of partnership.

These distinguished by further illustrations.—The nature of these complications and the distinctions to be observed may be exhibited by some further illustrations.

(a) *A* and *B* are partners. *A* dies, having appointed *B* his sole executor, and *B* carries on the trade with *A*'s capital. Here *B* is answerable to *A*'s estate as *partner*, and *A*'s executor, if he were a person other than *B* himself, would be the proper person to enforce that liability. *B* is also answerable as *executor* to the persons beneficially interested in *A*'s estate for the improper employment of his testator's assets.

(b) *A*, a trader, appoints *B* his executor and dies. *B* enters into partnership with *C* and *D* in the same trade, and employs the testator's assets in the partnership business. *B* gives an indemnity to *C* and *D* against the claim of *A*'s residuary legatees. Here *C* and *D* are jointly liable with *B* to *A*'s residuary legatees, not as partners, but as having knowingly made themselves parties to the breach of trust committed by *B* (l).

(c) *A*, being in partnership with *B* and *C*, appoints *B* his executor and dies. *B* and *C* continue to employ *A*'s capital in the business. *B* is liable as *executor* to account for the profits received by himself from the use of *A*'s capital, but not for the whole profits received therefrom by the firm (*m*). It is not certain to what extent *B* would be liable if *B* and *C* were sued together (*n*).

(d) *A* and *B* are partners in trade. *A* dies, having appointed *C* and *D* his executors, and authorized them to continue his capital in the trade for a limited time. On the expiration of that time *C* and *D* do not withdraw their testator's capital, but leave it as a loan to the firm, *B* and *E*, the then members of the firm, knowing the limit of the authority given by *A*'s will, and knowing the fund to belong to *A*'s estate. *B* and *E* are not liable to render to the persons interested under *A*'s will an account of profits since the time when *A*'s capital ought to have been finally withdrawn, inasmuch as *C* and *D* themselves are liable to *A*'s legatees only to make good the amount of the capital with interest (o).

(e) If the other facts are as in the last illustration, but *B*, one of *A*'s executors, is himself a member of the firm, *C* and *D*, the other executors,

(l) *Flockton v. Bunning* (1868) L. R. 8 Ch. 323n.

(m) Per Lord Cairns, L. R. 7 H. L. 334 (1874).

(n) *Lindley*, 708, 717.

(o) *Stroud v. Gwyer* (1860) 28 Beav. 130, 54 E. R. 315, 126 R. R. 57.

are still not accountable for any share of profits (*p*). *B* cannot be charged as executor with a greater share of profits in respect of his testator's capital than he has actually received (*q*), and it is doubtful whether he can be charged with profits at all (*p*).

(*f*) *A*, *B* and *C* are partners in a bank which is carried on upon the known private credit of the partners, and with little or no capital. *A* dies, having appointed *C* and *D* his executors. At the time of *A*'s death the debt to the bank on his private account exceeds his share in the assets. *B* and *C* take *D* into partnership, and continue the business without paying out *A*'s share. *C* and *D* are not accountable as executors for any share of the profits since *A*'s death, as *A* really left no capital in the business to which such profits could be attributed, and *D* entered the partnership and shared the profits, not as executor but on his own private account. In like manner *B*, *C* and *D* are [probably] not accountable to *A*'s estate as partners (*r*).

Claims must be distinct and against proper parties in proper capacity.—In these "mixed and difficult" cases, as Lord Lindley calls them (*s*), it is important for persons seeking to assert their right to an account of profits to make up their minds distinctly in what capacity and on the score of what duty they will charge the surviving partners or any of them. If they proceed against executors as such for what is really a partnership liability, if any, and without bringing all the members of the firm before the Court, failure will be the inevitable result (*t*). In a single case where one surviving partner out of several was held solely liable for the profits made by the employment of a deceased partner's capital by the firm there was in fact only a *sub-partnership* between this survivor and the deceased: and it was therefore held that the other members of the principal firm were under no duty to the estate of one who was not *their* partner at all, and were not necessary or proper parties to be sued (*u*).

And must be for profits alone, or for interest alone.—Again, the right, where it exists, is an alternative right to interest on the capital improperly retained in the business or to an account of the profits made of its use; and one or other of these alternatives must be distinctly chosen. A double claim for both profits and interest is of course inadmissible, and it has been laid down that a mixed claim is equally so. "If relief can be

(*p*) *Vyse v. Foster* (1874) L. R. 7 H. L. 318, 44 L. J. (Ch.) 37; see per Lord Selborne, L. R. 7 H. L. at p. 346.

(*q*) *Jones v. Foxall* (1852) 15 Beav. 388, 51 E. R. 588, 92 R. R. 473; per James, L. J., *Vyse v. Foster* (1872) L. R. 8 Ch. at pp. 333, 334.

(*r*) *Simpson v. Chapman* (1853) 4 D. M. G. 154, 43 E. R. 466, 102 R. R. 61.

(*s*) Lindley, 708.

(*t*) See *Simpson v. Chapman* (1853) 4 D. M. G. 154, 43 E. R. 466, 102 R. R. 61; *Vyse v. Foster* (1874) L. R. 7 H. L. 318, 44 L. J. (Ch.) 37; *Travis v. Milne* (1851) 9 Ha. at p. 149, 68 E. R. at p. 452, 89 R. R. 365.

(*u*) *Brown v. De Tastet* (1821) Jac. 284, 37 E. R. 858, 23 R. R. 59; see p. 381, above.

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obtained on the footing of an account of profits, it must be an account of profits and nothing else ; " a claim for profits as to part of the time over which the dealing extends, and interest as to the other part, or for profits against some or one of the surviving partners, and interest against others, cannot be allowed (v).

Account of profits after dissolution useless in practice.—It is a question, however, whether success in asserting claims of this kind is not in practice little more profitable than failure ; for an account of profits after dissolution has seldom or never been known to produce any real benefit to the parties who obtained it (w).

The Madras High Court has held that the election between demanding a share of the profits or interest may be exercised even after accounts have been taken (x).

38. A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions from the date of any change in the constitution of the firm.

Revocation of continuing guarantee by change in firm.

Revocation of continuing guarantee : Change in firm.—This section, except for an improvement in style by verbal condensation of the concluding words, reproduces sec. 260 of the Contract Act and sec. 18 of the English Act. The law there stated was by no means new, as will appear from the authorities cited below.

The agreement to the contrary required to displace the effect of this section must be clearly shown. It is not implied in the mere fact that the guarantee is given to a firm whose name has ceased to describe its existing members, and is to secure the balance of a current account (y). Such an intention may be apparent from other circumstances. A bond given to trustees to secure the faithful service of a clerk to an incorporated insurance society having a large number of members, " some of whom might be changed before the wax on the bond was cold," was held enforceable without regard to the identity of the members for the time being, the purpose being clear and the interposition of trustees

(v) Per Lord Cairns, *Vyse v. Foster* (1874) L. R. 7 H. L. at p. 336 ; *Sahul Hamid v. Sulthan* (1947) Mad. 574, (1947) A. M. 287.

(w) Lindley, 5th ed. 536, note (y) : " The writer is not aware of any instance in which such a judgment has been worked out and has resulted beneficially

to the person in whose favour it was made."

(x) *Ramakrishna Ayyar v. Muthusami Ayyar* (1928) 52 Mad. 672, 121 I. C. 609, A. I. R. 1929 Mad. 456.

(y) *Backhouse v. Hall* (1865) 6 B. & S. 507, 141 R. R. 495.

removing any formal difficulty about parties (z). A case of this kind can hardly occur in modern practice.

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The one Indian decision reported on the former equivalent section is in a plain case. *A* becomes surety to the firm of "N. C. Mookerji" for *B*'s conduct as cashier to the firm. The constitution of the firm is subsequently changed, and its name is altered to N. Mookerji & Son. *A* is not liable for *B*'s defalcations subsequent to the change (*a*).

For the rules as to continuing guarantees in general see Contract Act, secs. 129-131.

(z) *Metcalf v. Bruin* (1810) 12 East, 400; 11 R. R. 432.

(a) *Neel Comul Mookerjee v. Bipra Das Mookerjee* (1901) 28 Cal. 597.

CHAPTER VI.

DISSOLUTION OF A FIRM.

Preliminary Note.—In the Contract Act there is very little on this subject. We now have rules, mainly following those laid down in the English Act, for dissolution by consent (sec. 40), by operation of law (sec. 41), automatically (sec. 42), optionally (sec. 43), and judicially (sec. 44), and the consequent winding up of the firm's affairs and settlement of accounts.

The rules, for the most part long settled in English practice, are clearly stated. Difficulties in applying them arise from the frequent complexity of the facts, especially when the obligations of a partner are conjoined with fiduciary duties of other kinds, as often happens in England at any rate. Further, the relevant facts may be made difficult of ascertainment by lax and careless conduct of the business. For such complications there is no legislative or judicial remedy. Any attempt to formulate special rules of evidence or presumptions would be pretty sure to do more harm than good.

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39. The dissolution of partnership between all the partners of a firm is called the "dissolution of the firm."

Dissolution of firm.—Note that a firm is not said to be dissolved by the fact of one or more members ceasing to be partners in it while others remain, but only when all and every one of the members of the firm cease to carry on its business in partnership.

If a new firm is formed by agreement between some of the former partners, it will none the less be new, however closely that agreement may follow on the dissolution of the old firm. The fact and date of the dissolution may, of course, be disputable in particular circumstances.

A dissolution does not necessarily follow because the partnership has ceased to do business, for the partnership may continue for the purpose of realising the assets (b).

40. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

Dissolution by agreement.

(b) *Sathappa v. Subramaniam*, A. I. R. 1927 P. C. 70, 53 M. L. J. 245, 101 I. C. 17; *Palhoomal v. Paramanand*, A. I. R. 1933 Sind 121, 143 I. C. 900; *Gundayya v. Siddappa* (1937) 173 I. C. 194, A. I. R. 1937 Mad. 599; *Gokaldoss v. Parry &*

Co. (1925) 48 Mad. 795, 91 I. C. 127, A. I. R. 1925 Mad. 1249; *Bhawanidas v. Jethsing* (1938) 175 I. C. 214, A. I. R. 1938 Sind 82; *Vazirbhai v. Gadmal* (1940) Bom. 505, 190 I. C. 420, A. I. R. 1940 Bom. 263.

"Contract between the partners."—This is new in terms but quite familiar law. "Contract between the partners" obviously means a contract already made; the most likely case is that of a clause in the partnership articles providing for dissolution in certain events, as mentioned in the Special Committee's note.

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A contract between a partner and his co-partners for remuneration to him for the management of the partnership business by a commission on sale, during his lifetime, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on except at a loss, nor does it imply an obligation to pay the managing partner compensation in case the partnership is dissolved for that reason (c).

Division of immoveable partnership property on dissolution and question of registration.—In *Venkataratnam v. Subbarao* (d) the High Court of Madras held that a deed of release by a partner of his share in the partnership business did not require registration even though the partnership owned immoveable property. This was based on the reason that, though a partner may be a co-owner of the partnership property, he has no right to ask for a share in that property, but only that the partnership business should be wound up, including therein the sale of the immoveable property, and to ask for a share in the resulting assets. In a subsequent case, the same High Court dissented from that judgment and held that an instrument of dissolution of partnership affecting or involving modification of title to immoveable property required registration (e). The High Court of Bombay has also taken the view that such an instrument requires registration (f).

41. A firm is dissolved—

Compulsory dissolution. (a) by the adjudication of all the partners or of all the partners but one as insolvent, or

(b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership :

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

(c) *Cowasjee v. Lalbhoy* (1876) 1 Bom. 468, L. R. 3 I. A. 200, in appeal from (1871) 8 Bom. H. C. O. C. 209.

(d) (1926) 49 Mad. 738, 96 I. C. 881, A. I. R. 1926 Mad. 1040.

(e) *Samuvier v. Ramasubbier* (1932) 55 Mad. 72, 132 I. C. 305, A. I. R. 1931 Mad. 580.

(f) *Joharmal v. Tejram* (1893) 17 Bom. 235, 256.

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Clause (a).—Clause (a) is new as an express enactment. In substance it is a necessary corollary to sec. 34, sub-sec. 1, under which a partner adjudged insolvent ceases from that date to be a partner. If no partner or only one partner is left it is obvious that there can no longer be a firm. There does not appear to be any reported authority that says so, nor is there any need for it.

Clause (b).—Clause (b) is in the same words as sec. 34 of the English Act, and Sir F. Pollock's commentary on that section is accordingly reproduced here.

Illustrations.

1. *A* and *B* charter a ship to go to a foreign port and receive a cargo on their joint venture. War breaks out between England and the country where the port is situated before the ship arrives at the port, and continues until after the time appointed for loading. The partnership between *A* and *B* is dissolved (*g*).

2. *A* is a partner with ten other persons in a certain business. An Act is passed which makes it unlawful for more than ten persons to carry on that business in partnership. The partnership of which *A* was a member is dissolved.

3. *A*, an Englishman, and domiciled in England, is a partner with *B*, a domiciled foreigner. War breaks out between England and the country of *B*'s domicile. The partnership between *A* and *B* is dissolved (*h*). ["Domiciled" is not quite the right expression according to recent authority. See below on "alien enemy."]

Effects of war.—The war of 1914-1918 brought these matters into prominence. Commercial relations involving subjects of a State which has become hostile, or persons carrying on their business in the territory of such a State, had to be considered in the light of two quite distinct rules of the common law, one as to personal disqualification,

(*g*) See *Esposito v. Bowden* (1857) 7 E. & B. 763, 27 L. J. (Q. B.) 17, 119 E. R. 1430, 110 R. R. 822.

(*h*) *Griswold v. Waddington* (1818) (Supreme Court, New York) 15 Johns. 57, 16 *ibid.* 438. The suggestion that partnership, like other subsisting contracts between subjects of the hostile States, is only suspended, does not seem tenable: see the judgment of the Court of Criminal Appeal in *R. v. Kupfer* [1915] 2 K. B. 321, 338, 84 L. J. (K. B.) 1021. Note, however, that the resumption of business on the old terms at the end of the war would probably be held without difficulty to be a reconstitution of the partnership. There is no reason

for extending this rule by analogy to the position of an enemy shareholder in a British company, though his right to receive or recover dividends is suspended: *Schuster*, *op. cit.* 25. On the other hand, it would clearly apply to a limited partnership: *Limited Partnerships Act*, 1907, sec. 7. Where the English partner in the dissolved firm continued the business here, the H. L. held that he was not entitled to take the enemy partner's share at a valuation, but must account for the profits made after dissolution by the use of that partner's capital in England: *Stevenson v. Cartonnagen-Industrie* [1918] A. C. 239, 87 L. J. (K. B.) 416.

the other as to trading with enemies. There was considerable doubt as to several points until the full Court of Appeal dealt with a group of cases early in 1915 (i). The results of that considered judgment are as follows :—

The term “alien enemy” includes persons of any nationality voluntarily resident in a hostile country.

But it does not include, for the purpose of the common law rules, a subject of an enemy State resident within the realm with the licence of the Crown ; and registration of an alien under the Aliens Registration Act, 1914, and the Aliens Restriction Order made in pursuance of the Act operates to confer such a licence (j).

Otherwise the general and ancient rule is that an alien enemy cannot sue in the King's Court (k), but he can be sued, may be heard in defence, and, if so advised, can appeal. The practical difficulties of substituted service on an enemy defendant outside the jurisdiction, with which the Court also dealt, are beyond our scope here.

It is conceived that transactions with a foreign company having a seat of business in England are governed by the same rules as transactions with an individual alien. A company registered and having its place of business in a hostile country is treated in our Prize Courts as an enemy without regard to the nationality of its shareholders (l).

The rule as to dissolution of partnership as regards any partner who is an alien enemy is not affected, except as to the definition of enemy character. If all the partners in a firm trading here were enemy aliens every one of them would have to register separately.

The judgment of the Court of Appeal obviously does not affect any special restrictions imposed by statute or statutory orders on enemy subjects resident here by licence.

Inasmuch as a body corporate may be a partner, it is proper to note here that the friendly or hostile character of such a body is not conclusively determined by the place of its registration and its official seat, nor by the nationality of its members or the majority of them. A company incorporated and registered here may be an enemy if it carries on business in an enemy country, or if its business is under the control of persons

(i) *Porter v. Freudenberg, dec.* [1915] 1 K. B. 857, 84 L. J. (K. B.) 1001.

(j) *Princess Thurn and Taxis v. Moffitt* [1915] 1 Ch. 58, 84 L. J. (Ch.) 220, approved by the C. A. in *Porter v. Freudenberg*.

(k) A much discussed article in the

Hague Conventions of 1907 (IV. 23 h) is held not to bear on this point. As to English procedure see further, if desired, *Rodriguez v. Springer* [1919] A. C. 59.

(l) *The Roumanian* [1915] P. 26, affirmed [1916] 1 A. C. 124, 85 L. J. (P. C.) 33.

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resident in an enemy country or adhering to or controlled by enemies ; on which last question the prevailing character of the shareholders is material though not conclusive (*m*).

For the general rules against trading with enemies see the commentary in Pollock and Mulla's edition of the Contract Act, pp. 167-169.

42. Subject to contract between the partners a firm is dissolved—

Dissolution on the happening of certain contingencies.

(a) if constituted for a fixed term, by the expiry of that term ;

(b) if constituted to carry out one or more adventures or undertakings, by the completion thereof ;

(c) by the death of a partner ; and

(d) by the adjudication of a partner as an insolvent.

All this is settled law. References to the corresponding passages in secs. 32 and 33 of the English Act are given in the Special Committee's note.

Clause (a): Fixed term.—A firm constituted for a term is of course not exempt from dissolution by any of the other possible causes before the expiration of the term.✓

Clause (c): Death of partner.—The fact that a partnership is entered into for a single adventure, and therefore is to last till the termination of the adventure, does not preclude dissolution by death (*n*). A covenant by a deceased partner binding his executors to continue the partnership cannot be specifically enforced against the executors and the effect of the death of the partner coupled with the refusal of the executors to continue the partnership is the dissolution of the firm (*o*). Contract to continue a partnership after death of a partner may be express or implied : *Ramkumar v. Kishorilal* (1946) All. 309, (1946) A. A. 259, 222 I. C. 231. For implied contract to continue see *Devji Goa v. Tricumji*, 49 C. W. N. 299, (1945) A.P.C. 71.

(*m*) *Daimler Co.'s Case* [1916] 2 A. C. 307, 85 L. J. (K. B.) 1333 ; see especially the opinion jointly prepared by Lord Parker and Lord Sumner. For application of the principle by Russell, J. with full discussion, see *Re Badische Co., Ltd.* [1921] 2 Ch. 331, 91 L. J. (Ch.) 133.

(*n*) *Abdul Hak v. Tumulari*

Vykuntam (1927) 52 Mad. L. J. 318, 100 I. C. 616, A. I. R. 1927 Mad. 491. This should have been too obvious to call for decision.

(*o*) *Lancaster v. Allsup* (1888) 57 L. T. 53 ; *Satyanarayanamurthi v. Gopalan* (1939) 2 M. L. J. 279, 186 I. C. 57, A. I. R. 1939 Mad. 891.

43. (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.

Dissolution by
notice of partner-
ship at will.

See
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(2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Partnership at will: Notice of dissolution.—This again is familiar law, except that notice is required to be in writing: see the English Act, sec. 32 (c). But the partner giving notice to dissolve the firm cannot thereby determine all duties and responsibilities of its members in respect of their partnership: "the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding up the affairs" (p). Provision is made for this by sec. 47 below.

The state of mind of any partner to whom such notice is given makes no difference, for however sane he was he could not object (q).

44. At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely:—

Dissolution by the
Court.

- (a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner;
- (b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner;
- (c) that a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business;
- (d) that a partner, other than the partner suing, wilfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;

(p) *Crawshaw v. Maule* (1818) 1 Swanst., at p. 508, 18 R. R., at p. 132. | (q) *Mellersh v. Keen* (1859) 27 Beav. 235, 122 R. R. 390.

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- (e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of Order XXI of the First Schedule to the Code of Civil Procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or of any dues recoverable as arrears of land-revenue due by the partner ;
- (f) that the business of the firm cannot be carried on save at a loss ; or
- (g) on any other ground which renders it just and equitable that the firm should be dissolved.

Dissolution by Court.—This declaration of the grounds for judicial dissolution answers, with verbal variation and additional provision adapted to Indian procedure, to sec. 35 of the English Act, which was itself a somewhat enlarged following of sec. 254 of the Indian Contract Act.

Clause (e) resembles sec. 33, sub-sec. 2, of the English Act in part, but goes farther in making total alienation of a partner's interest, in whatever way, a cause for dissolution.

As to clause (g), Lord Lindley's remark that the Court ought not to fetter itself by any rigid rules (r) is obviously founded on common sense and there is certainly no authority against it. Application of what is called in England the *ejusdem generis* rule of construction would really leave no room for the clause to operate. "Just and equitable" means however something more than "convenient." A mere opinion of the Court that dissolution would on the whole be the best course is not enough.

About the substance of what is here laid down for the guidance of the Court there can be very little doubt. The form has gone through a series of expert legislative revisions. Accordingly, not much comment is required. It will be remembered that the Contract Act, sec. 254, sub-sec. 5, spoke of "gross misconduct" in the affairs of the firm, and the adjective might have been thought to narrow the discretion of the Court (though it does not seem to have done so in fact). It is not used in the English Act, and has now disappeared. Even as the Contract Act stood, persistent refusal or neglect to attend to the business was ground for a dissolution (s).

What conduct of a partner is ground for dissolution (t).—
It is rather difficult to fix the point at which acts of a partner tending to

(r) Lindley, p. 693.

(s) *Krishnamachariar v. Sankara Sah*
(1920) 22 Bom. L. R. 1343, 57 I. C. 713,

P. C.

(t) The following observations are
taken from Sir F. Pollock's Digest.

shake the credit of the firm and the other partner's confidence in him become sufficient ground for demanding a dissolution. The fact that a particular partner's continuance in the firm is injurious to its credit and custom is not of itself ground for a dissolution where it cannot be imputed to that partner's own wilful misconduct. In a case where one partner had been insane for a time, and while insane had attempted suicide, this was held not to be a cause for dissolution, although it was strongly urged that the credit of the firm could not be preserved if he remained in it (u). On the other hand, conduct of a partner in the business carried on by the firm and its predecessors, though not in the actual business of the existing firm, which was calculated to destroy mutual confidence among the partners, has been held sufficient ground for a dissolution (v).

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Actual malversation of one partner in the partnership affairs, such as failing to account for sums received (w), is ground for a dissolution; so is a state of hostility between the partners which has become chronic and renders mutual confidence impossible, as where they have habitually charged one another (x), or one partner has habitually charged another (y), with gross misconduct in the partnership affairs.

In *Atwood v. Maude* (z) Lord Cairns said:—

“It is evident . . . that in every partnership . . . such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either;” and he added that, when it is admitted that this state of feeling does in fact exist, it becomes immaterial by whom a judicial dissolution of the partnership is sought.

45. (1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution:

Liability for acts
of partners done
after dissolution.

Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner,

(u) *Anon.* (1855-56) 2 K. & J. 441, 452, 69 E. R. 855, 110 R. R. 308, 315.
Qu., is this now the law?

(v) *Harrison v. Tennant* (1856) 21 Beav. 482, 52 E. R. 945, 111 R. R. 175.

(w) *Cheesman v. Price* (1865) 35

Beav. 142, 55 E. R. 849, 147 R. R. 74.

(x) *Baxter v. West* (1860) 1 Dr. & Sm. 173, 62 E. R. 344, 127 R. R. 64.

(y) *Watney v. Wells* (1861) 30 Beav. 56, 54 E. R. 810, 132 R. R. 182; *Leary v. Shout* (1864) 33 Beav. 582.

(z) L. R. 3 Ch. at p. 373 (1868).

S. 45 retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

(2) Notices under sub-section (1) may be given by any partner.

Acts of partners after dissolution.—The first sub-section is really equivalent to sec. 36, sub-sec. 1, of the English Act, but more explicitly stated. That enactment speaks of dealings with a firm “after a change in its constitution,” but the much older authority makes it clear that the meaning of these words cannot be narrowed to a change short of dissolution (a). It will be observed that in India public notice (see sec. 72) is now sufficient in all cases, without any distinction between old and new customers (b). The question arises whether we are to understand, as a literal reading of the terms would suggest, that public notice is necessary as well as sufficient, in other words, that it would be no answer to a party suing on an act such as here described that, although public notice of dissolution had not been given, the plaintiff was in fact aware that the firm was dissolved. Sec. 264 of the Contract Act was differently worded: “Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.” Thus the reservation was clear and express. Can we suppose that it is abrogated—which would be a surprising and, it seems, unreasonable novelty—merely by the omission to repeat it in terms? Compare the English Act, sec. 36, sub-sec. 2, where there is no express saving of private notice. It seems then that notice in fact, of any kind, is good if proved. It will not, of course, be established by matter of mere surmise or conjecture.

The proviso is equivalent to sec. 36, sub-sec. 3, of the English Act, and the illustrations given in Sir F. Pollock’s commentary thereon may be found useful.

Illustrations.

1. *A* and *B*, partners in trade, agree to dissolve the partnership, and execute a deed for that purpose, declaring the partnership dissolved as from January 1; but they do not discontinue the business of the firm or give notice of the dissolution. On February 1, *A* indorses a bill in the partnership name to *C*, who is not aware of the dissolution. The firm is liable on the bill (c).

(a) See *Ex parte Robinson*, stated in illustration 1 below.

(b) Sec. 264 of the Contract Act was finally held in 1920 not to have abolished the rule that old customers were entitled

to special notice, see *Jwaladutt R. Pillani v. Bansilal Motilal* (1929) L. R. 56 I. A. 174.

(c) *Ex parte Robinson* (1833) 3 D. & Ch. at p. 388.

2. A bill is drawn on a firm in its usual name of the M. Company, and accepted by an authorized agent. *A* was formerly a partner in the firm, but not to the knowledge of *B*, the holder of the Bill, and ceased to be so before the date of the bill. *B* cannot sue *A* upon the bill (*d*).

3. *A* is a partner with other persons in a bank. *A* dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. *A*'s estate is liable to customers of the bank for balances due to them at *A*'s death, so far as they still remain due, and for other partnership liabilities incurred before *A*'s death (*e*); but not for any debts contracted or liabilities incurred by the firm towards customers after *A*'s death (*f*).

In the case of liabilities of the firm which have arisen after *A*'s death, it makes no difference that at the time when the partnership liability arose the customer believed *A* to be still living and a member of the firm (*g*).

In a recent case (*h*) the words "a partner who not having been known to the person dealing with a firm to be a partner" fell to be construed. *Lynskey, J.*, said "Whether he was to other people an apparent partner, or whether he was a dormant partner, the words seem to me to be equally applicable. If the person dealing with the firm did not know that the particular partner was a partner, and if that partner retired, then, as from the date of his retirement, he ceases to be liable for further debts contracted by the firm with that person. The fact that later the person dealing with the firm may discover he was a partner seems to me to be irrelevant. If the person who subsequently deals with the firm had no knowledge prior to the dissolution that the retiring partner was a partner, then (the proviso) comes into operation, and, in effect, relieves the person retired from liability."

In this case *A* and *B* were partners and had dissolved the partnership, *A* agreeing to continue the business. After dissolution, *A* ordered certain goods from *X* and used note-paper on which appeared the names of *A* and *B* as partners. It was held that *B* had not authorized *A* to use the old note-paper and, therefore, *B* was not liable to *X*.

(*d*) *Carter v. Whalley* (1830) 1 B. & Ad. 11, 109 E. R. 691, 35 R. R. 199.

(*e*) *Devaynes v. Noble* (1816) 1 Mer. 529, 35 E. R. 767, 15 R. R. 151; *Sleech's Case* (1816) 1 Mer. at p. 539, 35 E. R. 771, 15 R. R. 155; *Clayton's Case* (1816) 1 Mer. at p. 572, 35 E. R. 781, 15 R. R. 161.

(*f*) *Brice's Case* (1816) 1 Mer. 622, 35 E. R. 797, 15 R. R. 171.

(*g*) *Houlton's Case* (1816) 1 Mer. 616, 35 E. R. 796, 15 R. R. 169. The judg-

ment itself in this case is not reported; but it appears by the marginal note and the context that it followed *Brice's Case*. The authority of *Houlton's Case* is not affected by anything in the Act: *Friend v. Young* [1897] 2 Ch. 421, 428, 66 L. J. (Ch.) 737. See *Hameed Rowther v. Aiyappa Mudaliar* (1940) 187 I. C. 100, A. I. R. 1940 Rang. 60.

(*h*) *Tower Cabinet Co., Ltd. v. Ingram* (1949) 1 All. E. R. 1033, 1037-1038.

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The High Court of Madras has held that where money is borrowed by the surviving partner to pay for and take delivery of goods ordered by the firm in the lifetime of the deceased partner, the estate of the deceased is not liable for the debt. All that the creditor is entitled to is a personal decree against the surviving partner and a decree against the partnership assets in the hands of those partners (i).

Some time ago the opinion was expressed in the Bombay High Court that a dormant partner is liable for obligations incurred after his retirement. This was under the Contract Act, sec. 264; we do not think it could be so held under the proviso to the present section; in any case, we thought this opinion wrong before, and should with still more confidence think any Court wrong which followed it now (j). The only ground on which a retired partner can be liable is that credit was given to him as an ostensible partner (j).

An infant was apprenticed to two persons trading in partnership. The covenants by the partners in the apprentice deed were joint covenants. One of the partners went out of the firm and gave notice to the covenantees. It was held that the dissolution of the firm was a breach of the covenants as the partners had thereby rendered themselves unable to carry out their covenants towards the infant and they were liable in damages (k).

46. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

Right of partners
to have business
wound up after
dissolution.

Partners' rights on dissolution.—This is the substance of sec. 39 of the English Act, with verbal condensation. Sec. 265 of the Contract Act, amended in 1880, which it supersedes, gave the Court a general power to act, which was exercised according to English authority. The law being in substance unchanged, though more definitely declared, our former commentary is here repeated.

Suit for account.—No suit will lie, as a general rule, by one partner against another for partnership accounts without praying a dissolution (l).

(i) *Seshi Ammal v. Viaravan Chettiar* (1918) 35 Mad. L. J. 669, 47 I. C. 958.

(j) *Gorio v. Vallabhdas* (1915) 17 Bom. L. R. 762, 30 I. C. 904, followed (wrongly, we think) *Chenchuvenkatanagiah Chetty v. Padmanathan Chetty*, 106 I. C. 904, A. I. R. 1928 Mad. 125.

(k) *Titmers and Titmers v. Rose and*

Watts (1940) 1 All. E. R. 599.

(l) *Golla Nagabhushanam v. Kanakala* (1864) 2 M. H. C. 28; *Kassa Mal v. Gopi* (1886) 9 All. 120; *Damodara v. Subraya* (1917) 33 Mad. L. J. 509, 43 I. C. 217; *Mistry Goa Petha v. N. H. Moos* (1931) 10 Pat. 792, 133 I. C. 40, A. I. R. 1931 Pat. 312. See also *Lindley*, 592, 595-597.

If a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, which grounds must be alleged by the plaintiff in his pleadings (m). Such was the rule of English courts of equity. And when a suit for account is brought all questions arising between the partners out of the partnership transaction should be disposed of in that suit (n). Ordinarily in a suit for partnership accounts, the account of the partnership will begin from the commencement of the partnership, unless it is shown that there has been an adjusted account at a later date (o).

No suit can be maintained by one partner against another in respect of any transaction which forms an item of the partnership account, for such a suit would, from its very nature, involve the taking of the whole partnership account, and this can only be done in a suit for an account (p). Thus one partner cannot sue for money lent by him to a firm of which he is a member; for the advance is but an item in the partnership account (q). But the suit will lie if it is brought on a transaction which does not involve a general account of all the partnership dealings. Thus one partner can sue his co-partners for contribution in respect of moneys borrowed by him under an express agreement with them for the purposes of the partnership without also asking for a general account (r). Similarly, "when two partners borrow from a bank on their joint promissory note, and apply the money borrowed to the partnership concern, and one of the partners is compelled to pay more than his share of the debt, the transactions have been considered to be separate and altogether *dehors* the partnership, and as such capable of sustaining an action for contribution" (s). On the same principle, if partners borrow money from a stranger for starting the partnership business, and a decree is obtained by the creditor against the partners and executed against one of them only for the full amount, he is entitled to contribution from his co-partners (t). And one partner may likewise sue another for advances made by him not to the partnership concern, but to the other partner in respect of what he is to contribute

(m) *Krishnaswami Naidu v. Jayalakshmi Ammal* (1931) 54 Mad. 671, 130 I. C. 766, A. I. R. 1931 Mad. 300.

(n) *Lalbhai v. Kavasi* (1871) 8 B. H. C. O. C. 209; *Keshav v. Rayappa* (1875) 12 B. H. C. 165.

(o) *Shawal Ram Dunharmal v. Tansukdash* (1929) 33 C. W. N. 1104, 125 I. C. 721, A. I. R. 1930 Cal. 154.

(p) *Bhagidas v. Oliver* (1872) 9 B. H. C. 418; *Manni Lal v. Narain Das*, 21 Luck. 295, (1946) A. O. 118; *Hari Shankar v. Bansilal* (1946) Nag. 301, (1946) A. Nag. 118; *Mohamadali v. Karji Kondho* (1945) A. P. 286, 220 I. C. 217; *Meyyappa Chettiar v. Palaniappa* (1949) A. M. 109, 2 Mad. L. J. 589.

(q) *Rustomji v. Sheth Purshotamdas* (1901) 25 Bom. 606. Nor can one partner sue another for money received by the latter on behalf of the firm, but not accounted for by him to the firm: *Bhut Nath Das v. Girish Chandra* (1907) 11 C. W. N. 311.

(r) *Durga v. Raghu* (1898) 26 Cal. 254.

(s) *Subbaragudu v. Adinarayudu* (1894) 18 Mad. 134, 135; *Dayal v. Khatav* (1875) 12 B. H. C. 97, 107; *Durga Prosunno Bose v. Raghu Nath Dass* (1898) 26 Cal. 254.

(t) *Labau Sardar v. Choyen* (1915) 19 C. W. N. 768, 29 I. C. 811.

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to the joint capital (u). Similarly, a suit is maintainable by one partner upon a promissory note given to him by the other partners in respect of an advance made by him to the firm, and it is no answer to such a suit that if the general accounts of the partnership were taken, nothing would be found due to him (v). Upon the same principle, if A and B enter into a partnership under an agreement that the whole capital should be brought in by A and that B should hand over to A all moneys received by him in the course of the partnership business irrespective of the state of the general account, A can maintain a suit against B for moneys received by B but not handed over to A (w). But where an individual is a common partner in two firms, no action can be brought by one firm against the other upon any transaction between them so long as that individual continues to be a common partner. This doctrine, however, does not rest upon any principles of the law of partnership, but is founded on the elementary rule of procedure that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action (x).

If the partner, on behalf of the firm, with the express or implied consent of the other partners spends sums of money on bribes, credit should be given to him for such sums in the taking of accounts, the question whether the expenditure on bribes was opposed to public policy being irrelevant, as the bribes in such a case are not the consideration of a contract which is sought to be enforced by the partners (y). But where a partner has given bribes without the consent of the other partners, he is not entitled to bring into account such payments so as thereby to obtain contributions for such payments from the other partners (z).

Accounts before commissioner.—In a partnership suit, accounts taken by a commissioner without production or discovery of the partnership books and documents are not properly taken (a).

Partner's right to accounts.—Every partner's legal right to have the accounts taken on dissolution is unaffected by any question, however grave, about his conduct in partnership affairs. The time for such questions to be decided is when the accounts are taken (b). And in taking them he

(u) 25 Bom. 606, note (g) page 399.

(v) *Vallam Kondu v. Malupeddi* (1908) 31 Mad. 343, distinguishing *Rustomji v. Sheikh Purshotamdas* (1901) 25 Bom. 606. See also *Ramnath v. Pitamber* (1916) 43 Cal. 733, 740-741, 31 I. C. 430.

(w) *Karri Venkata Reddi v. Kollu Narasayya* (1908) 32 Mad. 76; *Hirji Melaram v. Kirpa Ram Brij Lal* (1921) 2 Lah. 351, 66 I. C. 478.

(x) 25 Bom. at p. 612. See now the

Code of Civil Procedure, 1908, O. xxx, r. 9.

(y) *Joti Prasad v. Hardwari Mal* (1930) 53 All. 54, 137 I. C. 334, A. I. R. 1932 All. 128.

(z) *Venkatachala Chetty v. Natesa Chetty* (1939) 1 M. L. J. 905, A. I. R. 1939 Mad. 670.

(a) *Dwarkanath v. Haji Mahomed* (1915) 17 Bom. L. R. 5.

(b) *Ram Singh v. Ram Chand* (1923) L. R. 51 I. A. 154, 79 I. C. 944, A. I. R. 1924 P. C. 2.

cannot be charged with estimated loss of profit caused by his want of diligence in the business, short of fraud or wilful default (c).

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Legal representative of deceased partner.—The surviving partner or partners have the right and duty to realise the partnership property and in this sense they hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property. But the surviving partner cannot be considered a trustee or made liable as a trustee (d).

Appointment of receiver.—In England the effect of appointing a receiver is, to the extent of the authority delegated to him by the Court, to exclude everyone else from exercising the authority of a partner, whether usual or specially regulated by agreement; and if he is also appointed manager, the whole control of the business is transferred to him, subject to the directions of the Court, whose officer he is. Hence a receiver is seldom appointed when a dissolution is not contemplated (e), though it can be done (f), and a manager never (g). Where the partnership is already dissolved, it is almost a matter of course, though not a matter of right, to appoint a receiver at the instance of a partner (h). Where one or more partners are bankrupt, it is the practice of the Court to appoint the solvent acting partner receiver and manager, requiring security in its discretion. It is not considered desirable, as a rule, to separate the offices of receiver and manager, though the Court has power to do so (i). On the other hand, where the partnership is not yet dissolved, the appointment of a receiver is not an ordinary incident of an action for dissolution. "The due winding up of the affairs of the concern must be endangered to induce the Court to appoint a receiver of its assets" (j). There must be fraud or gross misconduct of some kind (k), or wilful denial of the complaining partner's rights (l), or persistence, under colour of right, in conduct endangering the assets (m). In such cases the Court will act either before or after a dissolution. "As, in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver, so in the course of winding up the affairs after the determination of the

(c) *Mahadev v. Ganoo* (1925) 27 Bom. L. R. 500, 87 I. C. 735.

(d) *Kasi v. V. Ramanathan Chettiar* (1949) 1 M. L. J. 298.

(e) See *Hall v. Hall*, 3 Mac. & G. 79, 87 R. R. 15.

(f) *Const v. Harris* (1823) T. & R. 496, 617, 24 R. R. 108, 125, 135.

(g) Lindley, 611.

(h) *Pini v. Romcoroni* [1892] 1 Ch. 633.

(i) *Collins v. Barker* [1893] 1 Ch.

578.

(j) Lindley, 617.

(k) E.g., *Smith v. Jeyes* (1841) 4 Beav. 503, 55 R. R. 149.

(l) *Hale v. Hale* (1841) 4 Beav. 369, 55 R. R. 107.

(m) *Madgwick v. Wimple* (1843) 6 Beav. 495, 63 R. R. 165, where surviving partners insisted (apparently in good faith, on their construction of the articles) on keeping a deceased partner's assets in the business.

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partnership the Court, if necessary, interposes on the same principle " (n). The jurisdiction "is founded on the common right of persons who are interested in property which is in danger to apply for its protection " (o), and even a doubt as to the legality of the partnership or its objects will not hinder the Court from preserving the property in the meantime (p), or enable a defendant to use such a technical objection to deny all relief to the plaintiff (q). The appointment of a receiver does not, of course, conclude any ultimate question.

A receiver and manager is an officer of the Court, and does not succeed to the personal fiduciary relations of partners. Accordingly, if he becomes entitled to an indemnity for expenses of management, he can look only to the assets under the control of the Court (r). He will not be restrained from dealing on his own account with customers of the firm, or competing with a purchaser of the business, doing nothing inconsistent with his employment while it lasts (s). A partner appointed receiver by the Court on the usual terms is entitled as such to his remuneration and costs out of the assets in his hands although as a partner he is in debt to the firm and unable to pay (t). His position as an officer of the Court is independent of the state of his accounts as a partner with the firm.

It is not thought useful to enter on administrative details of English practice, which are probably not applicable and certainly not binding in Indian Courts.

Receivers in Indian practice.—The power of Indian Courts to appoint a receiver is now defined by O. 40, r. 1, of the Code of Civil Procedure, 1908. Under that rule a receiver may be appointed "where it appears to the Court to be just and convenient." The High Court here in their original jurisdiction possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act (u). And when the assets of a partnership are in the hands of a receiver, they cannot be attached by a creditor of the firm without the leave of the Court first obtained, as the assets in such a case are in the hands of the Court through its officer, the receiver; and such leave will not be granted except on such terms as will ensure equality between the creditors (v). The Procedure Code of 1908 (O. 40) assimilates Indian to English practice.

(n) Lord Eldon, *Wilson v. Greenwood* (1818) 1 Sw. 471, 481, 18 R. R. 118, 123.

(o) Knight Bruce, L. J., *Evans v. Coventry* (1854) 5 D. M. G. 911, 916, 104 R. R. 343, 347.

(p) *Sheppard v. Ozenford* (1855) 1 K. & J. 491, 103 R. R. 203.

(q) *Hale v. Hale*, note (l) above.

(r) *Boehm v. Goodall* [1911] 1 Ch. 155.

(s) *Re Irish* (1888) 40 Ch. D. 49.

(t) *Davy v. Scarth* [1906] 1 Ch. 55.

(u) *Jaisissondas v. Zenabai* (1890) 14 Bom. 431, 434.

(v) *Kahn v. Ali Mahomed* (1892) 16 Bom. 577; *Shidlingappa v. Shankarappa* (1903) 28 Bom. 176.

Limitation period for a suit for dissolution.—The period of limitation for a suit for an account and a share of the profits of a dissolved partnership is three years from the date of dissolution (*w*); and the period is the same even if the instrument of partnership is registered (*x*). It is open, however, to the partners to come together and agree to an account among themselves even after the expiry of three years from the date of dissolution; and such a settlement is supported by consideration, as all the partners make mutual promises to abide by the settlement (*y*).

Assets brought in after dissolution.—Where after a dissolution and winding up of the partnership affairs an asset falls in which for any reason has not been taken into account, "it ought to be divided between the ex-partners or their representatives, according to their shares in the former partnership" (*z*). But if there has been no taking of accounts and no final settlement, the proper remedy is to have the accounts of the partnership taken; and if it is too late to do that it is too late to claim a share in the newly recovered asset; for the plaintiff could not make such a claim good without showing that he would be entitled to that share upon the due taking of the accounts (*a*). It is open, however, to the partners to come together and agree to an account among themselves even after the expiry of three years from date of dissolution; and such a settlement is supported by consideration as all of them make mutual promises to abide by such settlement (*b*).

Costs in a suit for dissolution.—Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing (*c*).

Interest.—Interest on any sum found due to a partner runs only from the date of the final decree by which it is found due. A partner is not generally chargeable with interest on overdrawings (*d*).

Interest on any amount found due on a suit for dissolution of a partnership was from the date of the decree finding it due, not of the plaint (*d*).

(*w*) Limitation Act, 1908, Sch. 1, Art. 106. See *Sudarsanam v. Narasimhulu* (1901) 25 Mad. 149.

(*x*) *Vairavan v. Ponnayya* (1898) 22 Mad. 14.

(*y*) *Roohi Ram v. Faizullah* (1933) 37 C. W. N. 580.

(*z*) Dicta in *Knox v. Gye* (1872) L. R. 5 H. L. 658, as explained in the case next cited (they were misunderstood in some of the Indian High Courts).

(*a*) *Gopala Chetty v. Vijayaraghavachariar* [1922] 1 A. C. 488, L. R. 49 I. A. 181, 45 Mad. 378, 74 I. C. 621, reversing the decision of the High Court

of Madras and overruling *Merwanji Hormusji v. Rustomji Burjorji* (1882) 6 Bom. 628; *Sokkanadha v. S.* (1904) 28 Mad. 344; *Sadhu Narayana v. Ramaswami* (1908) 32 Mad. 203 and cases following them.

(*b*) *Roohi Ram v. Faizullah* (1933) 37 C. W. N. 580, 35 Bom. L. R. 745, 142 I. C. 549, A. I. R. 1933 P. C. 120.

(*c*) *Ram Chunder v. Manick Chunder* (1881) 7 Cal. 428.

(*d*) *Suleman v. Abdul Latif* (1930) L. R. 57 I. A. 245; *Veeraswami v. Bandaru Chetty* (1948) A. M. 231, 2 M. L. J. 450.

**Sec.
46, 47**

Purchase of partnership assets by one of the partners.—

Where one of the partners has a preponderating interest in the partnership, he may submit a proposal to the Court for the purchase of the share of the other partner or partners. It is open to the Court, in such a case, to value the share of the other partner or partners and to order the sale of the concern to the partner with the preponderating interest (e).

Form of plaint in a suit for dissolution.—See for former practice Civil Procedure Code, 1882, Sch. IV, No. 113; as to forms of decrees, see Nos. 132 and 133 (f); and now Civil Procedure Code, 1908, Sch. I, App. A, No. 49, as to form of plaint, Sch. I, App. D, Nos. 21 and 22, as to forms of decrees (g).

47. After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm (h) and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Continuing authority of partners for purposes of winding up.

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

Continuing authority of partners after dissolution.—This section follows sec. 38 of the English Act with only the minute verbal variation in the second paragraph required to adapt it to Indian insolvency procedure. The superseded sec. 263 of the Contract Act was more general in wording, but was probably not intended to go beyond English law. Having regard to the correspondence with the rule of Indian law as now declared, it now seems useful to reproduce in part Sir F. Pollock's illustrations to the English sec. 38 in his Digest. Some of the omitted cases are of doubtful or more than doubtful authority, as there noted, and two of them are different from the Indian law as contained in sec. 34, and others are concerned with purely English procedure.

(e) *Sayers v. Sayers* (1876) A. C. 174 ;
Nagireddi Pothuraju v. Veera Venkata Satyanarayana (1949) 1 M. L. J. 420.

(f) *Thirukumaresan v. Subbaraya* (1895) 20 Mad. 313.

(g) See, further, as to valuation for the purpose of court fees, *Chunni Lal v. Sheo Charan Lal* (1925) 47 All. 756,

89 I. C. 122, A. I. R. 1925 All. 787.

(h) *Babu alias Govinddas v. Gokuldoss* (1929) 57 Mad. L. J. 404, 126 I. C. 97, A. I. R. 1930 Mad. 393 (disposal of partnership property by surviving partners for purposes of winding up held to give a good title to the purchaser).

Illustrations.

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1. *A* and *B* are partners. *A* becomes bankrupt. *B* gives acceptances of the firm as security for an existing partnership debt to *C*, who knows of *A*'s bankruptcy. *C* indorses the bills for value to *D*, who does not know of the bankruptcy. *D* is entitled to rank as a creditor of the firm for the amount of the bills (*i*).

2. *A* and *B* are partners. *A* becomes bankrupt. *B* continues to carry on the trade of the firm, and pays partnership moneys into a bank to meet current bills of the firm. The bank is entitled to this money as against *A*'s trustee in bankruptcy (*j*).

3. *A* and *B* are partners in trade. *A* becomes bankrupt. The solvent partner, *B*, but not other persons claiming through him by representation or assignment, may, notwithstanding the dissolution of the partnership wrought by *A*'s bankruptcy, sell any of the partnership goods to pay the debts of the firm (*k*), and the purchaser will be entitled to the entire property in such goods as against *A*'s trustee in bankruptcy (*l*).

4. *A* and *B*, shareholders in partnership, buy certain railway shares. Before the shares are paid for they dissolve partnership. Either of them may pledge the shares to the bankers of the firm to raise the purchase-money, and may authorize the bankers to sell the shares to indemnify themselves (*m*).

5. *A* and *B* having been partners in a business, dissolve partnership and *A* takes over the business and property of the firm. If *A* gives negotiable instruments in the name of the old firm, then (subject to the rights of creditors of the firm) *B* is not bound thereby (*n*), unless he has specially authorized the continued use of the name for that purpose (*o*).

6. Partnership articles provide that, before each division of profits, interest shall be credited to both partners on the amount of capital standing to the credit of their respective accounts. This alone does not authorize the allowance of interest, in the event of a dissolution, for the interval between the dissolution and the final settlement of the partnership accounts (*p*).

(*i*) *Ex parte Robinson* (1833) 3 Dea. & Ch. 376, Coop. t. Brough. 162, 38 R. R. 39.

(*j*) *Woodbridge v. Swann* (1833) 4 B. & Ad. 633, 110 E. R. 594, 38 R. R. 337.

(*k*) *Fraser v. Kershaw* (1856) 2 K. & J. 496, 69 E. R. 878, 110 R. R. 340. The authority to sell is "personal to him in his capacity of partner": 2 K. & J. p. 501, 69 E. R. 880, 110 R. R. 343.

(*l*) *Fox v. Hanbury* (1776) Cowp. 445, 98 E. R. 1179.

(*m*) *Butchart v. Dresser* (1853) 4 D. M. G. 542, 43 E. R. 619, 102 R. R. 269.

(*n*) *Heath v. Sansom* (1832) 4 B. & Ad. 172, 110 E. R. 420, 38 R. R. 237.

(*o*) *Smith v. Winter* (1838) 4 M. & W. 454, 51 R. R. 678.

(*p*) *Barfield v. Loughborough* (1872) L. R. 8 Ch. 1, 42 L. J. Ch. 179.

**Sec.
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7. *A, B and C* are partners. *A* and *B* are adjudicated insolvent and afterwards indorse in the name of the firm a bill belonging to the partnership. The indorsee acquires no property in the bill. [Under the English law even if *A* and *B* had indorsed the bill before adjudication, but after an act of bankruptcy committed by them, the indorsee would have acquired no property in the bill (*g*). The reason is that under English law bankruptcy relates back to the completion of the act of bankruptcy on which a receiving order is made (Bankruptcy Act, 1914, ec. 37, sub-sec. (1)), while under sec. 34, sub-sec. (1) of the present Act the partner does not cease to be a partner until the date of the order of adjudication.]

48. In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed :—

Mode of settlement of accounts between partners.

- (a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.
- (b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order :—
 - (i) in paying the debts of the firm to third parties ;
 - (ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital ;
 - (iii) in paying to each partner rateably what is due to him on account of capital ; and
 - (iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Accounts, how settled.—This section is identical, except for slight verbal variations, with sec. 44 of the English Act ; it replaces the Contract Act, sec. 265, which gave the Court very loosely defined powers. Accordingly the comments here given are much the same in substance as the notes on the English enactment already published by Sir F. Pollock in his

(*g*) *Thomason v. Frere* (1809) 10 East, 418, 103 E. R. 834, 10 R. R. 341.

Digest, but it is not thought useful to refer in detail to English decisions of long standing, the results of which are embodied and sufficiently stated in the Act.

Sub-sec. (a).—The terms of this clause are plain, but as to losses of capital it is to be observed that whatever is contributed by an individual partner is, at that stage, a loan to the firm, and will be dealt with as such under sub-clause (iii), ranking, however, after specific advances not being contributions to capital; and the other partners may be called on to contribute to it as a partnership loss in the proportions above named (the proportions of their shares in the capital are material only if there is a special agreement to that effect).

If a partner is insolvent and fails to pay his share, the solvent partners are not bound to make up his share of losses of capital after the liabilities of the firm to creditors have been satisfied (r).

Sub-sec. (b).—Almost word for word from Lindley. In clause (i) "third parties" is equivalent to "persons who are not partners in the firm," by the definition in sec. 2; but it would have been better English, though not a common expression, to say "outside parties." The official text, however, is no worse than many forms of professional speech which occur in English law reports and even in Acts of Parliament, although they are neither elegant nor correct nor even shorter than good English would be (sometimes indeed they are longer), and notwithstanding the protests of such English lawyers as seriously respect their own language.

Clause (ii).—The following judicial gloss should be noted: "account being taken of the equal [or as the case may be, according to the terms of the partnership] contributions to be made by him towards the deficiency of capital" (r).

Assets; Benefit of contracts.—A contract on the part of a limited company such as occurred in *Bachubai v. Shamji* (s), to continue to employ a firm as its agents, is not a valuable asset in which the legal representative of a deceased partner of the firm would be entitled to participate. The profits in respect of such a contract would be derived entirely from, and would depend absolutely upon the services of the surviving partners, and it is not one in respect of which any liability could be incurred by the estate of the deceased partner. But contracts of the character found in *Ambler v. Bolton* (t) and *McClellan v. Kennard* (u) constitute valuable assets, being in their nature such as would have rendered the estate of the deceased partner liable in the event of loss.

Partner's share.—Generally it must be remembered that a partner's share of assets is only what remains after payment of the firm's debts

(r) See *Garner v. Murray* [1904] 1 Ch. 57, 60, Lindley 721.

(s) (1885) 9 Bom. 536, 555, 556.

(t) (1872) L. R. 14 Eq. 427.

(u) (1874) L. R. 9 Ch. 336.

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and partners cannot by any agreement among themselves escape the necessity of this being done before they divide profits or even repay advances as between themselves. Subject to this governing principle the rules laid down in the present section express only the usual course of business, and are subject to variation if it appears that in the particular case the partners intended, as between themselves, to vary them.

49. Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

Joint and separate debts: Order of payment.—Save for minute verbal amendment, sec. 262 of the Contract Act is here reproduced, and our former comment on that section is therefore retained.

This is an English rule of administration in bankruptcy which was already fixed in the second quarter of the eighteenth century (v). "It has long been settled in bankruptcy that the joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other. . . . According to this rule, . . . joint creditors cannot touch the separate estate until after payment in full of the separate debts. They take the surplus only after payment of those debts" (w). The rule

(v) Lindley, 851.

(w) Turner, L. J., *Lodge v. Prichard* (1863) 1 De G. J. & S. 610, 613, 614, 137 R. R. 316, 317, 318. See further *Ridgway v. Clare* (1854) 19 Beav. 111, 115, 105 R. R. 80, 83. The Master of the Rolls' statement is thus summed up in the headnote:—

"The distinction between joint and separate assets is not restricted to the cases of a distribution under a bankruptcy or insolvency: it applies equally to the case of the administration of assets of deceased partners.

"In the administration of the assets of a deceased partner, where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the

joint debts thus paid will be allowed in account by the surviving partner.

"If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share.

"If both the deceased and surviving partners are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied.

"If both partners die before administration takes place, the rule is the same."

is established in all or nearly all common law jurisdictions, and has been embodied in successive English Bankruptcy Acts (x); but no one seems to know the original reasons for its adoption. It is generally disapproved on principle as unduly favouring separate at the expense of joint creditors, and it does not agree with mercantile usage or with the laws of other nations (y). Probably the framers of this Act thought it better to preserve the certain good, so far as it goes, of uniformity with English law than to enact a rule more just in itself, but divergent.

The present section is not limited to the case of insolvency, and seems to include by implication the right of every partner, which belongs to the class of equitable (not possessory) liens and is commonly called partners' lien, to have the partnership property duly applied when a dissolution takes place, from whatever cause. This right is separately declared by P. A. sec. 39. It is available after dissolution, as between the partners, against one partner who has taken over the assets and business of the firm, but not against former assets in the hands of a purchaser or mortgagee. The continuing partner is bound to apply the remaining assets in paying the partnership debts, but a purchaser from him in the ordinary course of business deals with him as owner, not as partner, and is not accountable for the application of his money (z). If, however, a surviving or continuing partner makes fresh acquisitions of property in the course of carrying on the business after dissolution, the property so acquired is not subject to the claim of the other partners or their executors, and they will not, in the event of his becoming bankrupt, be entitled to dispute the claim of his creditors thereon (a). But any benefit to be obtained from the search for a rule more reasonable in itself would probably be outweighed by the inconvenience of departing from settled English usage.

The rule is not limited to the case of insolvency and is available after dissolution, as between the partners, against one partner who has taken over the assets and business of the firm, but not against former assets in the hands of a purchaser or mortgagee. The continuing partner is bound to apply the remaining assets in paying the partnership debts, but a purchaser from him in the ordinary course of business deals with him as owner, not as partner, and is not accountable for the application of his money (b).

(x) Bankruptcy Act, 1914, sec. 33, sub-sec. 6, cp. sec. 63.

(y) Lindley, 855, 856, Pollock, 164 sqq., 12th ed.

(z) *Re Langmead's Trustee*, 20 Beav.

20, 7 D. M. G. 353; *Re Bourne* [1906] 2 Ch. 427, C. A.

(a) *Payne v. Hornby* (1858) 25 Beav. 280, 286.

(b) See note (z) above.

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50. Subject to contract between the partners, the provisions of clause (a) of sec. 16 (c) shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up :

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Personal profits earned after dissolution.—This corresponds in substance, and pretty closely in terms, to sec. 29, sub-sec. 2, of the English Act. The principle is that so long as the affairs of the dissolved firm are in process of winding up it is still the duty of every partner, or his representatives, as the case may be, not to make any private advantage out of transactions which are in substance on the firm's behalf. Thus, where a lease of immovables held for a firm's business expires after the death of a partner and before the affairs are fully wound up, and a surviving partner renews the lease, the lease belongs to the firm (d).

Similarly, if a partner has agreed to take a lease in his own name but in fact for the purposes of the firm, and dies before the lease is executed, his representatives cannot deal with the lease without the consent of the surviving partners (e).

51. Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless—

- (a) the dissolution is mainly due to his own misconduct, or
- (b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

(c) Prescribing a partner's duty to account for any individual profit derived from the business or the property of the firm.

(d) *Clements v. Hall* (1857) 2 De G. & J. 173, 44 E. R. 954.

(e) *Alder v. Fouracre* (1818) 3 Swanst. 489, 36 E. R. 947.

Premium : Return on premature dissolution.—This is to much the same effect as sec. 40 of the English Act, which however gives, in terms, a wider discretion to the Court ("the Court may order the repayment of the premium, or of such part thereof as it thinks just"). The Special Committee, however, regarded the change as merely verbal. In England the working rule seems, according to the most authoritative decision (*f*), to be that, in the absence of special cause to the contrary, the reasonable sum to be returned will be a sum bearing the same proportion to the whole premium as the unexpired part of the partnership term originally contracted for bears to the whole term. And, conversely, when the premium payable by a partner in fault is still unpaid, payment of it may be ordered (*g*). The judicial discretion of the judge who hears the cause will not be overruled by the Court of Appeal, except for strong reasons (*h*).

Illustrations.

1. *A* and *B* enter into a partnership for five years, on the terms of *A* paying a premium of £1,050 to *B*, £500 immediately, and the rest by instalments. In the second year of the partnership term, and before the whole of the premium has been paid, *A* is adjudicated a bankrupt on the petition of *B*. *B* is not entitled to any further payments on account of the premium, the partnership having been determined by his own act, and he may retain only so much of the part already paid to him as the Court thinks just (*i*).

2. *A* and *B* enter into a partnership for a term of years, *A* paying a premium to *B*. Long before the expiration of the term *B* becomes bankrupt.

B's estate must return or give credit for a proportionate part of the premium, as the bankruptcy which determined the partnership was *B*'s own act (*j*).

3. *A* and *B* enter into partnership for fourteen years, *B* paying a premium to *A*. In the course of the same year differences arise, there is a quarrel in which, in the opinion of the Court, *A* and *B* are both to blame. *A* excludes *B* from the business and premises of the partnership, and *B* sues *A* for a dissolution of partnership and return of the premium. *A* is entitled to retain only so much of the premium as bears the same proportion to its whole amount as the time for which the partnership has actually lasted bears to the whole term first agreed upon (*k*).

(*f*) *Atwood v. Maude* (1868) L. R. 3 Ch. 369.

(*g*) *Bluck v. Capstick* (1879) 12 Ch. D. 863.

(*h*) *Lyon v. Tweddell* (1881) 17 Ch. D. 529, C. A.

(*i*) *Hamil v. Stokes* (1817) 4 Pri. 161, 146 E. R. 426; and better in Dan. 20, 18 R. R. 690.

(*j*) *Freeland v. Stansfeld* (1852-4) 2 Sm. & G. 479, 65 E. R. 490, 97 R. R.

306. This is the modern view; reference to an earlier case in conflict with it is omitted.

(*k*) *Bury v. Allen* (1844-5) 1 Coll. 589, 63 E. R. 556, 66 R. R. 200; the proportion to be returned or allowed for was calculated on the same principle in *Astle v. Wright* (1856) 23 Beav. 77, 53 E. R. 30; *Pease v. Hewitt* (1862) 31 Beav. 22, 54 E. R. 1045; *Wilson v. Johnstone* (1873) L. R. 16 Eq. 606.

Ss.
51, 52

4. *A* and *B* are partners for a term of fourteen years, *B* having paid a premium of £600 to *A*. At the end of seven years of the term *B* gives notice of dissolution to *A*, under a power contained in the partnership articles, on the ground of *A*'s neglect of the business; and *B* claims to have the premium apportioned on the principle of the last illustration. *B* is not entitled to the return of half the premium, but only to such allowance as the Court thinks proper on a general estimate of the case (*l*).

5. *A* and *B* enter into partnership for fourteen years, *A* paying a premium calculated on two years' purchase of the net profits of the business. The partnership is dissolved within two years in consequence of mutual disagreements. No part of the premium is repayable (*m*).

6. *A* takes *B* into partnership for seven years, knowing him to be inexperienced in the business, and requires him on that account to pay a premium. After two years *A* calls on *B* to dissolve the partnership on the ground of *B*'s incompetence, and *B* sues *A* for a dissolution and the return of an apportioned part of the premium. *B* is entitled to the return of such part of the premium as bears the same proportion to the whole sum which the unexpired period of the term of seven years bears to the whole term (*n*).

7. *A* and *B* enter into partnership for fourteen years, *A* paying a premium. In the fourth year disputes arise, and a dissolution of the partnership by consent is gazetted. No agreement is made at the time of dissolution for the return of any part of the premium. *A* cannot afterwards claim to have any part of it returned (*o*).

52. Where a contract creating partnership is rescinded on the ground of the fraud or misrepresentation of any of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

Rights where
partnership contract
is rescinded for fraud
or misrepresentation.

- (a) to a lien on, or a right of retention of, the surplus or the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for any capital contributed by him;

(*l*) *Bullock v. Crockett* (1862) 3 Giff. 507, 66 E.R. 509. There not quite seven years of the term had in fact elapsed, but the Court allowed only £100 to the partner who had paid £800 premium. Cp. *Freeland v. Stansfeld*,

note (*j*), above.

(*m*) *Airey v. Borham* (1861) 29 Beav. 620, 54 E.R. 768.

(*n*) *Atwood v. Maude* (1868) L.R. 3 Ch. 369.

(*o*) *Lee v. Page* (1851) 30 L.J. Ch. 857.

- (b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and
- (c) to be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

This is identical with sec. 41 of the English Act except that, in accordance with the usage of the present Act, it reads "firm" for "partnership" in the operative part. It declares a special application of the principles as to rescinding a contract of any kind for fraud or misrepresentation; those principles must be sought in the general law of contract. Cp. Contract Act, secs. 17-19, and Ch. IV (not a very profitable chapter) of the Specific Relief Act. We have of course to remember that the contract of partnership is one of those in which the utmost good faith is required, not merely abstinence from active deceit; and that this duty "extends to persons negotiating for a partnership but between whom no partnership as yet exists" (p). We are not here concerned with the detailed application of the same principle in company law.

53. After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up:

Right to restrain
from use of firm
name or firm
property.

Provided that where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

No commentary is called for on this beyond the note of the Special Committee, which (with the substitution now proper of "section" for "clause") is as follows: "Sec. 53 is complementary to sec. 50. The earlier section does not prevent a partner from using the firm connection or property for his private ends during the winding up, but requires him to account for the profit he obtains thereby. The present section gives a power to the other partners or their representatives to prevent any partner absolutely from using the firm name or property until the winding up is completed." In practice cases of this kind do not seem likely to come before the Courts unless there is a real dispute as to the construction of the partnership contract.

**Sec.
54, 55**

54. Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits; and notwithstanding anything contained in sec. 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Agreements in
restraint of trade.

Agreements in restraint of trade.—This merely reproduces the second exception to sec. 27 of the Contract Act: a section which, as pointed out in our commentary thereon, adopts the old-fashioned hostility to all agreements in restraint of trade, and by no means corresponds to the modern English law. Two of the three exceptions allow limited restraints as between partners; one of these is dealt with by sec. 11 of the present Act, see p. 32 above, the other, in the like form, by the present section; both are repealed by sec. 73, below, as being no longer useful in their original place.

55. (1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

Sale of goodwill.
after dissolution.

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not—

Rights of buyer
and seller of goodwill

- (a) use the firm name,
- (b) represent himself as carrying on the business of the firm, or
- (c) solicit the custom of persons who were dealing with the firm before its dissolution.

(3) Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in sec. 27 of the Indian

Agreements in
restraint of trade.

Contract Act, 1872 (q), such agreement shall be valid if the restrictions imposed are reasonable. S. 55

Goodwill: Sale after dissolution.—Neither the Contract Act nor the English Partnership Act deals with the rules governing the disposal of goodwill after the dissolution of a firm; and it is true that those rules extend beyond cases where a business has been carried on in partnership, and so do not, strictly speaking, form part of the law of partnership more than other general rules of the law of contract and property which may at any time have to be applied to the affairs of a firm. But it is also true that the rules have been settled chiefly by decisions on partnership affairs, and that the matter of goodwill ought to be provided for, and regularly is, in the constitution of firms of any importance, and constantly has to be considered in their dissolution. Accordingly the Special Committee decided to include the principal rules in the present Act, but in a form somewhat simpler than an exact following of English case-law in its details would have produced.

It may be useful to give here Sir F. Pollock's summary of the rules as accepted in England. Some of the authorities are obviously or probably not applicable to Indian conditions.

Nature and incidents of "goodwill."—The term *goodwill* is a commercial rather than a legal one, nor is its use confined to the affairs of partnership firms. It is well understood in business, but not easy to define (r). It has been described as "the benefit arising from connexion and reputation" (s), which includes "the probability of the old customers going to the new firm" which has acquired the business (t); but this last phrase is not of itself adequate (u). That which the purchaser of a goodwill actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of "holding out" (v), and to represent himself to former customers as the successor to that business. Unless there is an express agreement to the contrary, the vendor remains free to compete with the purchaser in the

(q) This sub-section coincides in part with exc. (1) to I. C. A., sec. 27, but that exception, inasmuch as it extends beyond partnership affairs, is not repealed by the present Act.

(r) "A thing very easy to describe, very difficult to define": Lord Macnaghten in *Inland Revenue Commrs. v. Muller & Co.* [1901] A. C. at p. 223. [The Special Committee has been content to describe it as an intangible but valuable thing.]

(s) Lindley, 534.

(t) Lord Romilly, M. R., *Labouchere v. Dawson* (1872) L. R. 13 Eq. at p. 324; and see *Llewellyn v. Rutherford* (1875) L. R. 10 C. P. 456, 44 L. J. C. P. 281; *Wedderburn v. Wedderburn* (1855-6) 22 Beav. at p. 104, 52 E. R. at p. 1047, 11 R. R. 278.

(u) Per Lord Macnaghten, *Trego v. Hunt* [1896] A. C. 7, 23.

(v) *Burchell v. Wilde* [1900] 1 Ch. 551, 69 L. J. (Ch.) 314, C. A.

S. 55

same line of business (w); and he may publish to the world, by advertisements or otherwise, the fact that he carries on such business. But he must not specially solicit the customers of the old firm to transfer their custom to him (x), nor solicit even those who have become his customers already (y); and he must not use the name of the old firm so as to represent that he is continuing, not merely a similar business, but the *same* business. "You are not to say, I am the owner of that which I sold" (z). Probably the purchasers of the business might successfully object even to his carrying on a competing business in his own name alone, if that name had been used as the name of the late firm and had become part of its goodwill (a).

Goodwill does not "survive."—It was formerly supposed that on the death of a partner in a firm the goodwill *survived*—that is, that the surviving partners were entitled to the whole benefit of it without any express agreement to that effect. But it is now perfectly settled that this is not so (b). Surviving or continuing partners may in various ways have the benefit of the goodwill, and an intention to let them have it may be shown by conduct as well as words. "When a partner retires from a firm, assenting to or acquiescing in the retention by the other partners of possession of the old place of business and the future conduct of the business by them under the old name, the goodwill remains with the latter as of course" (c). But this really amounts to saying that in such a case the goodwill ceases to have any separate value. The retiring partner has nothing left that he could give except an undertaking not to compete with the firm; and this, as we have seen, is not implied even in an express assignment of goodwill (d).

It seems that in the business of solicitors goodwill in the ordinary sense hardly exists (e). The same reason might apply to any other business

(w) *Churton v. Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56.

(x) *Trego v. Hunt* [1896] A. C. 7, 65 L. J. (Ch.) 1, reversing the decision of the C. A. [1895] 1 Ch. 462, 64 L. J. Ch. 392, and overruling *Pearson v. Pearson* (1884) 27 Ch. D. 146, on the point of principle. The dissenting judgment of Lindley, L. J., in the last named case was therefore correct. An express provision in the articles that an outgoing partner may start a similar business in the neighbourhood is merely declaratory, and does not exclude the rule against soliciting old customers: *Gillingham v. Biddow* [1900] 2 Ch. 242, 69 L. J. (Ch.) 527.

(y) *Curl Bros. v. Webster* [1904] 1 Ch. 685, 73 L. J. (Ch.) 540.

(z) *Churton v. Douglas* (1859) Johns. at p. 193, 70 E. R. 385, 123 R. R. 67.

(a) *Churton v. Douglas* (1859) Johns. at pp. 197, 198, 70 E. R. at p. 393, 123

R. R. 79. As to the right to the exclusive use of a trade name, see pp. 311, 312 above.

(b) The notion of the goodwill surviving is expressly contradicted, for instance, in *Smith v. Everett* (1859) 27 Beav. 446, 54 E. R. 175, 122 R. R. 484. For the history of the modern law, see the judgment of Romer, J., *Re David and Matthews* [1899] 1 Ch. 378, 382. As late as 1860 it was possible to suppose that the firm name survived. See 28 Beav. at p. 536, 54 E. R. 472, 120 R. R. at p. 253.

(c) *Menendez v. Holt* (1888) 128 U. S. 514, 522.

(d) Cp. Lindley, 535.

(e) See *Austen v. Boys* (1858) 2 De G. & J. 626, 635, 44 E. R. 1133, 119 R. R. 264, 270; *Arundell v. Bell* (C. A. 1883) 31 W. R. 477; but in *Burchell v. Wilde* (note (v), p. 415, above) it is assumed throughout that it does exist in some sense and for some purposes.

depending on personal and confidential relations, and wholly or mainly independent of local connection or the resorting of customers to a particular place (f).

S. 55

Right of partners to restrain use of partnership name.—It also seems that after a dissolution each of the partners in the dissolved firm or his representatives may, in the absence of any agreement to the contrary, restrain any other partner or his representatives from carrying on the same business under the partnership name until the affairs of the firm have been wound up and the partnership property disposed of (g). [Sec. 53 above removes any possible doubt in India.]

There is now sufficient authority for accepting this as a necessary consequence of the principles above stated (h). If any partner who may require it has a right to have the goodwill sold for the common benefit, it cannot be that each partner is also entitled to do that which would deprive the goodwill of all saleable value. There is express authority to show that while a liquidation of partnership affairs is pending one partner must not use the name or property of the partnership to carry on business on his own sole account, since it is the duty of every partner to do nothing to prejudice the saleable value of the partnership property until the sale (i). This question does not in any case affect the independent right of a late partner who is living and not bankrupt to restrain the successor to the business from continuing the use of his name therein so as to expose him to the risk of being sued as an apparent partner (j).

After the affairs of a dissolved firm are wound up every partner is free to use the firm name in the absence of agreement to the contrary (k), provided that he does not expose any late partner to liability (l).

Rights of partners as to goodwill.—On the dissolution of a partnership every partner has a right, in the absence of any agreement

(f) As in the case of commission merchants: *Steuart v. Gladstone* (1879) 10 Ch. Div. 626, 657; *op. Farr v. Pearce* (1818) 3 Mad. 74, 56 E. R. 437.

(g) *Re David and Matthews* [1899] 1 Ch. 378, 68 L.J. (Ch.) 185; *Lindley*, 536, 539.

(h) As to *Banks v. Gibson* (1865) 34 Beav. 566, 55 E. R. 753, which raises a difficulty, that was a case, "according to the view of the judge who decided it, where co-partners had agreed on dissolution to divide the assets, including the goodwill, so as to allow either partner to use the name of the partnership firm": *per Romer, J., Re David and Matthews* [1899] 1 Ch. 378, 384. See also *per*

Lindley, M.R., in Burchell v. Wilde [1900] 1 Ch. at p. 563, 69 L. J. (Ch.) 314.

(i) *Turner v. Major* (1862) 3 Giff. 442, 66 E. R. 483, 133 R. R. 162.

(j) *Scott v. Rowland* (1872) 20 W. R. 508.

(k) *Per James, L. J., Levy v. Walker* (1879) 10 Ch. Div. 445, 48 L. J. (Ch.) 273; *Muthu K. M. Meyyappa Chettyar v. Periyah* (1930) 9 Rang. 85, 131 I. C. 506, A. I. R. 1931 Rang. 138.

(l) *Burchell v. Wilde* [1900] 1 Ch. 551, 69 L. J. (Ch.) 314, C. A.; *Muthu K. M. Meyyappa Chettyar v. Periyah* (1930) 9 Rang. 85, 131 I. C. 506, A. I. R. 1931 Rang. 138.

S. 55

to the contrary, to have the goodwill of the business sold for the common benefit of all the partners (*m*).

Rights and duties of vendor and purchaser of goodwill.—Where the goodwill of a business, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following rules in the absence of any special agreement excluding or varying their effect:—

(a) The purchaser alone may represent himself as continuing or succeeding to the business of the vendor (*n*).

(b) The vendor may nevertheless carry on a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the same business (*n*).

(c) The vendor may publicly advertise his business, but may not canvass the customers of the former firm (*o*), even if they have of their own choice continued to deal with him (*p*). This rule extends to a vendor's executor carrying out a contract for the sale of goodwill (*q*). It does not matter that the executor has no discretion as to selling.

(d) The sale carries the exclusive right to use the name of the former firm (*r*), subject to this qualification, that the purchaser may use the vendor's name only "so long and so far as he does not by so doing expose him to any liability" (*s*). It also carries the benefit of any covenant by a partner not to carry on a competing business for a fixed term (*t*). The purchaser has the right to trade as the vendor's successor, but not

(*m*) Lindley, 539-541. In other words, the goodwill, and therefore also the firm-name, is part of the partnership assets: *Levy v. Walker* (1879) 10 Ch. Div. 436, 446, 48 L. J. (Ch.) 273.

(*n*) *Churton v. Douglas* (1859) Johns. 174, 70 E. R. 385, 123 R. R. 56. But the vendor's wife, having separate estate, cannot be restrained from carrying on a competing business on her own account and in her own name: *Smith v. Hancock* [1894] 2 Ch. 377, 63 L. J. (Ch.) 477, C. A. (diss. Kay, L. J.).

(*o*) *Trego v. Hunt* [1896] A. C. 7, 65 L. J. (Ch.) 1, where the House of Lords restored the authority of *Labouchere v. Dawson* (1872) L. R. 13 Eq. 322, against the Court of Appeal.

A partner who has been expelled under a provision in the articles is not restrained from carrying on the same business on his own account, or soliciting customers of the old firm: *Dawson v. Beeson* (1882)

22 Ch. Div. 504. Similarly, a bankrupt (*Walker v. Mottram* (1881) 19 Ch. D. 355, 51 L. J. (Ch.) 108) and a debtor who has assigned his business and goodwill for the benefit of creditors (*Farey v. Cooper* [1927] 2 K. B. 384, 96 L. J. (K. B.) 1046, C. A.) are not vendors for the purpose of the rule. [The Special Committee expressly declined to include these rather fine distinctions in the present Act.]

(*p*) *Curl Bros. v. Webster* [1904] 1 Ch. 685, 73 L. J. (Ch.) 540.

(*q*) *Boorne v. Wicker* [1927] 1 Ch. 667, 96 L. J. (Ch.) 361.

(*r*) *Levy v. Walker* (1879) 10 Ch. Div. 436, 48 L. J. (Ch.) 273; *Re David and Mathews* [1899] 1 Ch. 378, 68 L. J. (Ch.) 185.

(*s*) *Thynne v. Shove* (1890) 45 Ch. Div. 577, 582, 59 L. J. (Ch.) 509.

(*t*) *Townsend v. Jarman* [1900] 2 Ch. 698, 69 L. J. (Ch.) 823.

to hold out the vendor as still in the business and personally answerable (u). A purchaser of "assets" without any restrictive terms, or a partner retaining the "assets" on dissolution, is entitled to the goodwill, with its incidental rights (v). The effect of special terms, if any, must be considered in each case as they occur (w). On a dissolution without any special provision naming or including goodwill, or restricting the use of the firm-name, either partner may use the old name, provided he does not thereby expose a former partner to any substantial risk. Whether there is such risk in the particular case is a question of fact depending on the nature of the business and other circumstances (x).

S.

The English authorities of which we have stated the effect will be profitable in India just so far as they are used with discretion for explaining and illustrating the principles underlying the law. But it must not be forgotten that the law itself is henceforth contained in the terms of the section before us, which are plain enough not to call for resort to former English decisions to ascertain their actual meaning.

(u) 45 Ch. Div. at p. 580; *Churton v. Douglas* (1859) Johns. at p. 190, 70 E. R. at p. 391, 123 R. R. 65.

(v) *Jennings v. Jennings* [1898] 1 Ch. 378, 67 L. J. (Ch.) 190.

(w) See *Pearson v. Pearson* (1884) 27 Ch. Div. 145, 54 L. J. (Ch.) 32, not overruled on this point.

(x) *Burchell v. Wilde* [1900] 1 Ch. 551, 69 L. J. (Ch.) 314, C. A.; *Townsend v. Jarman* [1900] 2 Ch. 698, 69 L. J. (Ch.) 823. As to the incidents of goodwill in general, Lord Eldon's declarations and directions in *Cook v. Collingridge* (1825) published in 27 Beav. 459, 23 R. R. 767, 54 E. R. 180, are still instructive.

CHAPTER VII.

REGISTRATION OF FIRMS.

Sec.
56, 57

56. The Provincial Government of any Province may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to that province or to any part thereof specified in the notification.

Power to exempt
from application of
this Chapter.

Registration.—This chapter is entirely new. The policy of its framers, and the reasons for not attempting to make registration of firms generally compulsory at present, are set forth in paras. 12-24 of the Special Committee's report. There is no direct compulsion, but we shall see that sec. 69 makes registration highly desirable for firms carrying on business in districts not specially excepted from the operation of this chapter under the powers of the present section.

In England not only firms but individual persons carrying on business under any name not identical (to put it shortly) with the usual name or names of the persons concerned are required by the Registration of Business Names Act, 1916, to register both the business names and the personal names of the parties in the form therein prescribed. Registration is not called for in the case of a firm-name consisting only of the usual names of the partners, but the result is that the great majority of firms have to be registered. The English Act uses the term "true surname"; this obviously would not do for India, and even in England it would be easy to suggest awkward questions about finding a surname in some exceptional cases; but it is no one's interest to raise difficulties, and it is not known that there have been any. The nationality and the other business occupation, if any, of each partner in a registered firm have to be stated under sec. 2 of the English Act; the present Act does not require these particulars.

57. (1) The Provincial Government may appoint Registrars of Firms for the purposes of this Act, and may define the areas within which they shall exercise their powers and perform their duties.

Appointment of
Registrars.

(2) Every Registrar shall be deemed to be a public servant within the meaning of sec. 21 of the Indian Penal Code.

Sec. 21 of the Penal Code is an elaborate specification of the classes of persons who are public servants. Offences committed by public servants

in abuse of their offices or wilful disregard of their official duty are dealt with in Ch. IX of the Code, offences committed by others in contempt of their lawful authority in Ch. X.

Sec.
57, 58

58. (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating—

Application for
registration.

- (a) The firm-name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the names in full and permanent addresses of the partners, and
- (f) the duration of the firm.

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.

(2) Each person signing the statement shall also verify it in the manner prescribed,

(3) A firm-name shall not contain any of the following words, namely :—

“Crown,” “Emperor,” “Empress,” “Empire,” “Imperial,” “King,” “Queen,” “Royal,” or words expressing or implying the sanction, approval or patronage of the Crown or the Central Government or any Provincial Government, except when the Provincial Government signifies its consent to the use of such words as part of the firm-name by order in writing.

Sub-sec. 3 corresponds to sec. 11, sub-sec. 3, of the Indian Companies Act, 1913, and enacts like prohibitions in the case of registered firm-names.

A partner refusing to register.—The registration of a partnership is optional and one partner cannot compel another partner to join in the registration of the firm. Even if it is an implied term of the partnership

Sa.
59-62.

agreement that the partners should register the partnership, a suit to enforce such a contract would not lie having regard to the provisions of section 69(1) (y).

59. When the Registrar is satisfied that the provisions of sec. 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

Registration.

This and the following sections down to and including sec. 68 give executive directions which speak plainly for themselves and do not call for comment or illustration.

60. (1) When an alteration is made in the firm name or in the location of the principal place of business of a registered firm, a statement may be sent to the Registrar accompanied by the prescribed fee, specifying the alteration, and signed and verified in the manner required under section 58.

Recording of
alterations in firm
name and principal
place of business.

(2) When the Registrar is satisfied that the provisions of sub-section (1) have been duly complied with, he shall amend the entry relating to the firm in the Register of Firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under section 59.

61. When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under section 59.

Noting of closing
and opening of
branches.

62. When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in section 61.

Noting of changes
in names and
addresses of partners.

63. (1) When a change occurs in the constitution of a registered firm any incoming, continuing or outgoing partner, and when a registered firm is dissolved any person who was a partner immediately before the dissolution, or the agent of any such partner or person specially authorised in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make a record of the notice in the entry relating to the firm in the Register of Firms, and shall file the notice along with the statement relating to the firm filed under section 59.

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(2) When a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, and the firm is then a registered firm, he, or his agent specially authorised in this behalf, may give notice to the Registrar that he has or has not become a partner, and the Registrar shall deal with the notice in the manner provided in sub-section (1).

64. (1) The Registrar shall have power at all times to rectify any mistake in order to bring the entry in the Register of Firms relating to any firm into conformity with the documents relating to that firm filed under this Chapter.

(2) On application made by all the parties who have signed any document relating to a firm filed under this Chapter, the Registrar may rectify any mistake in such document or in the record or note thereof made in the Register of Firms.

Observe that the consent of all parties is essential to the Registrar's authority to act under sub-sec. 2. He has no power to deal with any disputed question of an alleged mistake.

65. A Court deciding any matter relating to a registered firm may direct that the Registrar shall make any amendment in the entry in the Register of Firms relating to such firm which is consequential upon its decision; and the Registrar shall amend the entry accordingly.

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66. (1) The Register of Firms shall be open to inspection by any person on payment of such fee as may be prescribed.

Inspection of
Register and filed
documents.

(2) All statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and on payment of such fee as may be prescribed. ✓

67. The Registrar shall on application furnish to any person, on payment of such fee as may be prescribed, a copy, certified under his hand, of any entry or portion thereof in the Register of Firms.

Grant of copies.

68. (1) Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, be conclusive proof of any fact therein stated.

Rules of evidence.

(2) A certified copy of an entry relating to a firm in the Register of Firms may be produced in proof of the fact of the registration of such firm, and of the contents of any statement, intimation or notice recorded or noted therein.

69. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm. ✓

Effect of non-
registration.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-secs. (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

- (b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.
- (4) This section shall not apply—
 - (a) to firms or to partners in firms which have no place of business in the Provinces, or whose places of business in the Provinces are situated in areas to which, by notification under section 56, this Chapter does not apply, or
 - (b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

This section came into force on the 1st of October, 1933, see sec. 3 above.

Its effect, stated broadly, is to put a firm in a registration district if it does not choose to be registered, and also its partners, under disabilities which may be extremely inconvenient. There is no direct compulsion but a pretty strong persuasive pressure to come on the register. No member of an unregistered firm can enforce his rights under the partnership contract against either the firm or any present or past member of it, neither can the firm sue its customers on their contracts. The firm remains liable to be sued by persons outside it, and cannot plead a set-off. Only suits for dissolution of the firm, and the powers of official assignees under the Insolvency Acts, are exempt from the prohibition. A small and harmonious firm dealing in a small way and mainly for ready money might be content to take these risks (mitigated as they are by the proviso of sub-sec. 4(b) as to claims not exceeding Rs. 100 in value). For a business of any considerable magnitude they appear sufficiently deterrent.

There have been differing opinions on the question whether registration of a partnership is a condition precedent to the filing of a suit or whether the defect can be remedied by the registration of the firm subsequent to the filing of the suit. In some cases the courts have been of the opinion that a suit by an unregistered firm could be validated by the subsequent

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registration of the firm (z). On the other hand, it has been held that a subsequent registration could not cure the defect which existed at the time of the institution of the suit (a). It is submitted that the latter view is correct and is supported by the preponderance of authorities.

The section relates not only to an unregistered firm in existence, but also to a firm which has been dissolved (b). Where a partnership is dissolved by the death of a partner, a suit by the surviving partner to enforce a bond that had been executed in favour of the firm is not barred by sub-sec. (2) (c). "It seems that the intention of the Legislature was to inflict disability for non-registration only during the subsistence of the partnership" (1948) A.M. 187.

70. Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Penalty for
furnishing false
particulars.

This and the following section require no comment.

71. (1) The Provincial Government may make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Register of Firms :

Power to make
rules.

Provided that such fees shall not exceed the maximum fees specified in Schedule I.

(z) *Varadarajulu Naidu v. Rajamanika Mudaliar* (1937) 2 M. L. J. 273, A. I. R. 1937 Mad. 767; *Jakiuddin Badruddin v. Vithoba Jagannath Gadali*, A. I. R. 1939 Nag. 301; *Radha Charan Saha v. Matilal Saha* (1937) 41 C. W. N. 534.

(a) *Subramania Mudaliar v. East Asiatic Co., Ltd.* (1936) 71 M. L. J. 663, 165 I. C. 939, A. I. R. 1936 Mad. 991; *Lokramdas Chatomal v. Tharumal Shevaram* (1939) Kar. 765, 184 I. C. 88, A. I. R. 1939 Sind 206; *Syed Ibrahim Sahib v. Gurulinga Aiyar* (1937) 2 M. L. J. 717, 175 I. C. 811, A. I. R. 1938 Mad. 185; *Laduram Sagarmal v. Jamuna Prasad Chaudhuri* (1939) 18 Pat. 114, 182 I. C. 796, A. I. R. 1939

Pat. 239; *Chhagan Lal v. Mangal Sain Raj Narain* (1938) 179 I. C. 363, A. I. R. 1938 Lah. 767; *Ponnuchami Goundar v. Muthusami Goundar* (1942) Mad. 355, 199 I. C. 99, A. I. R. 1942 Mad. 252, (1941) 2 M. L. J. 968; *Guno Prosad v. Abhoy Hari* (suit for a declaration that plaintiff is a partner with defendant) 52 C. W. N. 15; *Shanmugha Mudaliar v. Rathina Mudaliar* (1948) Mad. 481, (1948) A. M. 187.

(b) *Sheo Dutt v. Pushi Ram* (1946) All. 591, (1947) A. A. 229.

(c) *Ram Kumar v. Kishorilal* (1946) All. 309, (1946) A. A. 259, 222 I. C. 231; *Punnaya v. Bhadraraiya* (1948) A. M. 441, (1948) 1 Mad. L. J. 394.

(2) The Provincial Government may also make rules— **S. 71**

- (a) prescribing the form of statement submitted under section 58, and of the verification thereof ;
- (b) requiring statements, intimations and notices under sections 60, 61, 62 and 63 to be in prescribed form, and prescribing the form thereof ;
- (c) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein ;
- (d) regulating the procedure of the Registrar when disputes arise ;
- (e) regulating the filing of documents received by the Registrar ;
- (f) prescribing conditions for the inspection of original documents ;
- (g) regulating the grant of copies ;
- (h) regulating the elimination of registers and documents ;
- (i) providing for the maintenance and form of an Index to the Register of Firms ; and
- (j) generally, to carry out the purposes of this Chapter.

(3) All rules made under this section shall be subject to the condition of previous publication.

CHAPTER VIII.

SUPPLEMENTAL.

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72. A public notice under this Act is given—

- Mode of giving public notice.** (a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under section 63, and by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and
- (b) in any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

The contents of this final chapter, so far as are material to the application of particular operative provisions of the Act, have already been referred to in the appropriate places.

73. The enactments mentioned in Schedule II are hereby repealed to the extent specified in the fourth column thereof. [*Repealed by Act 1 of 1938.*]

Repeals.

74. Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

Savings.

- (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or
- (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or

- (c) anything done or suffered before the commencement of this Act, or
- (d) any enactment relating to partnership not expressly repealed by this Act, or
- (e) any rule of insolvency relating to partnership, or
- (f) any rule of law not inconsistent with this Act.

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This is the "abundant caution" clause, as it may be called, which for many years has been a common form of conclusion for codifying and consolidating legislation, with the modifications of detail required by the special subject-matter. The section, however, has been interpreted differently in some of the cases. In a Madras case the view was expressed that a suit by an unregistered firm to recover a sum of money due on a promissory note executed before the commencement of this Act was bad if the suit was filed after the passing of the Partnership Act and without the registration of the firm under section 69 (d). On the other hand, it has been held that if the right to sue accrued in favour of an unregistered firm before the commencement of this Act it is not necessary that the firm should be registered even though the suit was filed after the commencement of the Act (e). It is submitted that the latter view is correct. In a Sind case the view was taken that the Act commenced on the 1st October, 1933, on the ground that section 69 did not come into force until that date (f). This, it is submitted, is not a correct view of the commencement of the Act which was on the 1st October, 1932. But it was decided that a suit by an unregistered firm for rent due before the commencement of the Act was not barred but was expressly saved by this section.

(d) *Perakam Catholic Sangham v. Ravi Varma Thirumalpad* (1937) 171 I. C. 821, A. I. R. 1937 Mad. 419.

(e) *Gurdinomal Chandulal v. Usto Muhammad Hyat Allahando Khan* (1942)

Kar. 442, 204 I. C. 481, A. I. R. 1943 Sind 26; *Ramgopal Srinivas v. Net Ram* (1941) A. L. J. 107, 194 I. C. 344, A. I. R. 1941 All. 178.

(f) *Lokramdas v. Tharumal*, A. I. R. 1939 Sind 206.

SCHEDULE I.

MAXIMUM FEES.

[See sub-sec. (1) of sec. 71.]

Document or act in respect of which the fee is payable.	Maximum fee.
Statement under section 58	Three rupees.
Statement under section 60	One rupee.
Intimation under section 61	One rupee.
Intimation under section 62	One rupee.
Notice under section 63	One rupee.
Application under section 64	One rupee.
Inspection of the Register of Firms under sub-section (1) of section 66.	Eight annas for inspecting one volume of the Register.
Inspection of documents relating to a firm under sub-section (2) of section 66.	Eight annas for the inspection of all documents relating to one firm.
Copies from the Register of Firms . . .	Four annas for each hundred words or part thereof.

SCHEDULE II.

ENACTMENTS REPEALED.

[See sec. 73.]

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1872	IX.	The Indian Contract Act, 1872.	Exceptions 2 & 3 to section 27. The whole of Chapter XI.
1920	Burma Act VIII.	The Burma Registration of Business Names Act, 1920.	The whole.

APPENDIX I.

PARTNERSHIP ACT, 1890.

[53 & 54 VICT. CH. 39.]

ARRANGEMENT OF SECTIONS.

NATURE OF PARTNERSHIP.

Section.

1. Definition of partnership.
2. Rules for determining existence of partnership.
3. Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.
4. Meaning of firm.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THEM.

5. Power of partner to bind the firm.
6. Partners bound by acts on behalf of firm.
7. Partner using credit of firm for private purposes.
8. Effect of notice that firm will not be bound by acts of partner.
9. Liability of partners.
10. Liability of the firm for wrongs.
11. Misapplication of money or property received for or in custody of the firm.
12. Liability for wrongs joint and several.
13. Improper employment of trust-property for partnership purposes
14. Persons liable by "holding out."
15. Admissions and representations of partners.
16. Notice to acting partner to be notice to the firm.
17. Liabilities of incoming and outgoing partners.
18. Revocation of continuing guaranty by change in firm.

RELATIONS OF PARTNERS TO ONE ANOTHER.

19. Variation by consent of terms of partnership.
20. Partnership property.
21. Property bought with partnership money.
22. Conversion into personal estate of land held as partnership property.
23. Procedure against partnership property for a partner's separate judgment debt.

Section.

24. Rules as to interests and duties of partners subject to special agreement.
25. Expulsion of partner.
26. Retirement from partnership at will.
27. Where partnership for term is continued over, continuance on old terms presumed.
28. Duty of partners to render accounts, &c.
29. Accountability of partners for private profits.
30. Duty of partner not to compete with firm.
31. Rights of assignee of share in partnership.

DISSOLUTION OF PARTNERSHIP, AND ITS CONSEQUENCES.

32. Dissolution by expiration or notice.
33. Dissolution by bankruptcy, death, or charge.
34. Dissolution by illegality of partnership.
35. Dissolution by the Court.
36. Rights of persons dealing with firm against apparent members of firm.
37. Right of partners to notify dissolution.
38. Continuing authority of partners for purposes of winding up.
39. Rights of partners as to application of partnership property.
40. Apportionment of premium where partnership prematurely dissolved.
41. Rights where partnership dissolved for fraud or misrepresentation.
42. Right of outgoing partner in certain cases to share profits made after dissolution.
43. Retiring or deceased partner's share to be a debt.
44. Rule for distribution of assets on final settlement of accounts.

SUPPLEMENTAL.

45. Definitions of "court" and "business."
46. Saving for rules of equity and common law.
47. Provision as to bankruptcy in Scotland.
48. Repeal.
49. Commencement of Act.
50. Short title.

SCHEDULE.

PARTNERSHIP ACT, 1890.

CHAPTER 39.

An Act to declare and amend the Law of Partnership.

[14th August, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

NATURE OF PARTNERSHIP.

1. (1) Partnership is the relation which subsists between persons
Definition of partnership. of carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which is—

- (a) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies ; or
- (b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter ; or
- (c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries :

is not a partnership within the meaning of this Act.

2. In determining whether a partnership does or does not exist regard shall be had to the following rules :

Rules for determining existence of partnership.

- (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.
- (2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

- (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(a) The receipt by a person of a debt or other liquidated amount by instalments, or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such :

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such :

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such :

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto :

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such

3. In the event of any person to whom money has been advanced

Postponement
of rights of person
lending or selling in
consideration of
share of profits in
case of insolvency.

by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share

of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

4. (1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively
 Meaning of firm. a firm, and the name under which their business is carried on is called the firm-name.

(2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THEM.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership;
 Power of partner to bind the firm. and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by
 Partners bound by acts on behalf of firm. any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners;
 Partner using credit of firm for private purposes. but this section does not affect any personal liability incurred by an individual partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.
 Effect of notice that firm will not be bound by acts of partner.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner ; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

11. In the following cases, namely—

(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it ; and

(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm ;
the firm is liable to make good the loss.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership no other partner is liable for the trust-property to the persons beneficially interested therein.

Provided as follows :—

- (1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust ; and
- (2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

14. (1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

Persons liable by "holding out."

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators estate or effects liable for any partnership debts contracted after his death.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Admissions and representations of partners.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Notice to acting partner to be notice to the firm.

17. (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

Liabilities of incoming and outgoing partners.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

Revocation of continuing guaranty by change in firm.

RELATIONS OF PARTNERS TO ONE ANOTHER.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Variation by consent of terms of partnership.

20. (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Partnership property.

(2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Property bought with partnership money.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

Conversion into personal estate of land held as partnership property.

- 23.** (1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.
- Procedure against partnership property for a partner's separate judgment debt.
- (2) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

- 24.** The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules :
- Rules as to interests and duties of partners subject to special agreement.

(1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(a) In the ordinary and proper conduct of the business of the firm ; or,

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

(3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

- (4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.
- (5) Every partner may take part in the management of the partnership business.
- (6) No partner shall be entitled to remuneration for acting in the partnership business.
- (7) No person may be introduced as a partner without the consent of all existing partners.
- (8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Expulsion of partner.

26. (1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

Retirement from partnership at will.

(2) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

27. (1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

Where partnership for term is continued over, continuance on old terms presumed.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Duty of partners to render accounts, &c.

29. (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.

Accountability of partners for private profits.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Duty of partner not to compete with firm.

31. (1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

Rights of assignee of share in partnership.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

DISSOLUTION OF PARTNERSHIP, AND ITS CONSEQUENCES.

32. Subject to any agreement between the partners a partnership is dissolved—

- Dissolution by expiration or notice.
- (a) If entered into for a fixed term, by the expiration of that term :
 - (b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking :
 - (c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

- 33.** (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.
- Dissolution by**
bankruptcy, death,
or charge. (2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

- 34.** A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.
- Dissolution by**
illegality of partner-
ship.

- 35.** On application by a partner the Court may decree a dissolution of the partnership in any of the following cases :
- Dissolution by**
the Court. (a) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner :
- (b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract :
- (c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :
- (d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :
- (e) When the business of the partnership can only be carried on at a loss :
- (f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

36. (1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

Rights of persons dealing with firm against apparent members of firm.

(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Right of partners to notify dissolution.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights, and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Continuing authority of partners for purposes of winding up.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

Rights of partners as to application of partnership property.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

Apportionment of premium where partnership prematurely dissolved.

- (a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or
- (b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

Rights where partnership dissolved for fraud or misrepresentation.

- (a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is
- (b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and
- (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

42. (1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

Right of outgoing partner in certain cases to share profits made after dissolution.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits ; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Retiring or deceased partner's share to be a debt.

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed :

Rule for distribution of assets on final settlement of accounts.

- (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits next out of capital, and lastly, if necessary by the partners individually in the proportion in which they were entitled to share profits ;
- (b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order :

1. In paying the debts and liabilities of the firm to persons who are not partners therein ;
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital ;
3. In paying to each partner rateably what is due from the firm to him in respect of capital ;
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which the profits are divisible.

SUPPLEMENTAL.

45. In this Act, unless the contrary intention appears—

Definitions of "court" and "business."

The expression "court" includes every court and judge having jurisdiction in the case ;
The expression "business" includes every trade, occupation, or profession.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

Saving for rules of equity and common law.

47. (1) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.

Provision as to bankruptcy in Scotland.

(2) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Repeal.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Commencement of Act.

50. This Act may be cited as the Partnership Act, 1890.

Short title.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60.	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven.
19 & 20 Vict. c. 97.	The Mercantile Law Amendment Act, 1856.	Section four.
28 & 29 Vict. c. 86.	An Act to amend the law of partnership.	The whole Act.

APPENDIX II.

THE INDIAN CONTRACT ACT, 1872 (ACT IX OF 1872).

CHAPTER XI. (SECTIONS 239-266).

OF PARTNERSHIP.

239. "Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.

"Partnership" defined.

Persons who have entered into partnership with one another are called collectively a "firm."

"Firm" defined.

Illustrations.

(a) *A* and *B* buy 100 bales of cotton, which they agree to sell for their joint account; *A* and *B* are partners in respect of such cotton.

(b) *A* and *B* buy 100 bales of cotton, agreeing to share it between them. *A* and *B* are not partners.

(c) *A* agrees with *B*, a goldsmith, to buy and furnish gold to *B*, to be worked up by him and sold, and that they shall share in the resulting profit or loss. *A* and *B* are partners.

(d) *A* and *B* agree to work together as carpenters, but that *A* shall receive all profits and shall pay wages to *B*. *A* and *B* are not partners.

(e) *A* and *B* are joint owners of a ship. This circumstance does not make them partners.

240. A loan to a person engaged or about to engage in any trade or undertaking upon a contract with such person that the lender shall receive interest at a rate varying with the profits or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

Lender not a partner by advancing money for share of profits.

241. In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner, to be used in the business is to be considered a loan within the meaning of the last preceding section.

Property left in business by retiring partner, or deceased partner's representative.

242. No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Servant or agent remunerated by share of profits not a partner.

243. No person, being a widow or child of a deceased partner of a trader and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

Widow or child of deceased partner receiving annuity out of profits not a partner.

244. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.

Person receiving portion of profits for sale of goodwill not a partner.

245. A person who has, by words spoken or written or by his conduct, led another to believe that he is a partner in a particular firm is responsible to him as partner in such firm.

Responsibility of person leading another to believe him a partner.

246. Any one consenting to allow himself to be represented as a partner is liable, as such, to third persons who, on the faith thereof, give credit to the partnership (a).

Liability of person permitting himself to be represented as a partner.

247. A person who is under the age of majority according to the law to which he is subject (b) may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

Minor partner not personally liable but his share is.

248. A person who has been admitted to the benefits of partnership under the age of majority (b) becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time, of his repudiation of the partnership.

Liability of minor partner on attaining majority.

(a) See sec. 109 of the Indian Evidence Act, 1872 (I of 1872), revised edition, as modified up to 1st July, 1911.

(b) See the Indian Majority Act, 1875 (IX of 1875), as modified up to 1st May, 1906.

249. Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.

Partner's liability for debts of partnership.

250. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

Partner's liability to third person for neglect or fraud of co-partner.

251. Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

Partner's power to bind co-partners.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

Illustrations.

(a) *A* and *B* trade in partnership, *A* residing in England, and *B* in India. *A* draws a bill of exchange in the name of the firm. *B* has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b) *A*, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill.

(c) *A* and *B* carry on business in partnership as bankers. A sum of money is received by *A* on behalf of the firm. *A* does not inform *B* of such receipt, and afterwards *A* appropriates the money to his own use. The partnership is liable to make good the money.

(d) *A* and *B* are partners. *A*, with the intention of cheating *B*, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

252. Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all (c) of them, which consent must either be expressed, or be implied from a uniform course of dealing.

Annulment of contract defining partners' rights and obligations.

Illustrations.

A, B and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the nett profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A receiving one-half of the nett profits and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

253. In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules :—

Rules determining partners' mutual relations, where no contract to contrary.

- (1) all partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profits or loss :
- (2) all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership :
- (3) each partner has a right to take part in the management of the partnership business :
- (4) each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business :
- (5) when differences arise as to ordinary matters connected with the partnership business, the decision shall be according to the opinion of the majority of the partners ; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners (d) :

(c) See sec. 253, cl. (5), *infra*.

(d) See sec. 252, *supra*.

- (6) no person can introduce a new partner into a firm without the consent of all the partners :
- (7) if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members :
- (8) unless the partnership has been entered into for a fixed term, any partner may retire from it at any time :
- (9) where a partnership has been entered into for a fixed term, no partner can, during such term, retire except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever, except by order of Court :
- (10) partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

254. At the suit of a partner the Court may dissolve the partnership
 When Court may in the following cases :—
 dissolve partnership.

- (1) when a partner becomes of unsound mind :
- (2) when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors :
- (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person :
- (4) when any partner becomes incapable of performing his part of the partnership contract :
- (5) when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners :
- (6) when the business of the partnership can only be carried on at a loss.

255. A partnership is in all cases dissolved by its business being
 Dissolution of prohibited by law.
 partnership by
 prohibition of
 business.

256. If a partnership entered into for a fixed term be continued
 Rights and obligations of partners in partnership continued after expiry of term for which it was entered into.
 after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

257. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

General duties of partners.

258. A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

Account to firm of benefit derived from transaction affecting partnership.

Illustrations.

(a) *A, B and C* are partners in trade. *C*, without the knowledge of *A* and *B*, obtains for his own sole benefit a lease of the house in which the partnership business is carried on. *A* and *B* are entitled to participate if they please, in the benefit of the lease.

(b) *A, B and C* carrying on business together in partnership as merchants trading between Bombay and London. *D*, a merchant in London, to whom they make their consignments, secretly allows *C* a share of the commission which he receives upon such consignments, in consideration of *C*'s using his influence to obtain the consignments for him. *C* is liable to account to the firm for the money so received by him.

259. If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

Obligations, to firm, of partner carrying on competing business.

260. A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.

Revocation of continuing guarantee by change in firm.

261. The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death.

Non-liability of deceased partner's estate for subsequent obligations.

262. Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each

Payment of partnership debts and of separate debts.

partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

263. After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding-up the business of the partnership.

Continuance of partners' rights and obligations after dissolution.

264. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

Notice of dissolution.

(e)**265.** Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of its debts and distribute the surplus according to the shares of the partners respectively.

Winding-up by Court on dissolution or after termination.

266. Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships and joint-stock companies, shall be regulated by the law for the time being in force relating thereto (f).

Limited liability partnerships, incorporated partnerships, and joint-stock companies.

(e) This section was substituted for the original sec. 265 by the Indian Contract Act (1872), Amendment Act, 1886 V of 1886), sec. 1.

(f) See the Indian Companies Act, 1913 (VII of 1913), and the following special Acts: V of 1838 (Bengal Bonded

Warehouses), as amended by V of 1854, V of 1857 (Oriental Gas Company), as amended by XI of 1867; Madras Act VI of 1869 (Equitable Assurance Society); the other special Acts, as being such Acts, have not been republished in any Code.

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